Mr Justice Clifford

SUPREME COURT OF THE UNITED STATES.

No. ~~220~~. 88.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G ROSE, App'ts,

vs.

HENRY L. BURCHAM et al.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF ILLINOIS.

GIDEON, PRINTER.

3-49

SUPREME COURT OF THE UNITED STATES.

No. 330.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE, App'ts,

vs.

HENRY L. BURCHAM et al.

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INDEX.

	Original.	Print.
Style of court	1	3
Bill of complaint	4	3
Plat	31	12
Demurrer to bill	32	12
Demurrer overruled and leave granted defendants to answer bill	37	13
Answer of defendants	38	14
Replication to answer	91	29
Petition of complainants	94	30
Amendment to bill	98	31
Stipulation of counsel	100	31
Bill dismissed as to complainants, Dutcher, Powell, and Thatcher	102	32
Death of complainant, John Baum, suggested, and appearance of his heirs entered	102	32
Argument of case	103	32
John W. Magill appointed comm'r to take deposition of Wm. A. Chatfield	106	33
Interrogatories	107	34
Commission to John W. Magill	120	37
Deposition of Wm. A. Chatfield	123	38

	Original.	Print.
Plat referred to	163	48
List of papers read in evidence	167	49
Patent to Francis Besion	169	50
Contract of Francis Bezayon with Wm. Armstrong	173	50
Assignment from Wm. Armstrong to Thomas T. Benbridge	180	53
Assignment from Thomas T. Benbridge to James Mix	187	54
Stipulation of counsel	196	56
Decree	198	57
Appeal prayed and granted	202	58
Appeal bond	203	58
Clerk's certificate	207	59
Proof of value	208	59

UNITED STATES OF AMERICA,
Northern District of Illinois.

Pleas in the Circuit Court of the United States of America for the Northern District of Illinois, in Chancery sitting, at the city of Chicago, in the said district, before the Honorable Thos. Drummond, Judge of the District Court of the United States for the district aforesaid, and in the absence pro tempore of the Hon'l. John McLean, one of the Justices of the Supreme Court of the United States, sole Judge of said Circuit Court, on Thursday the first day day of December, of the October adjourned term, in the year of our Lord one thousand eight hundred and fifty-nine, and of our independence, the eighty-fourth year.

WM. H. BRADLEY, Clerk.

Northern District of Illinois, sct.

HENRY L. BURCHAM, GEORGE W. MARSHALL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SCHRUGLEY, FREDERICK SWANNELL, ALEXANDER DELORI, SARAH JANE BENNETT, SAMUEL A. LANE, OLIVE ROBISHAM, JAMES TAYLOR, WILLIAM P. SYMONDS, JOHN BAUM, JACOB DUTCHER, THOMAS POWELL, EDWIN R. ROWLEY, GALEN H. MARCY AND LYDIA TODD, ABRAM BEEDLE, JEREMIAH PECK, AND WILLIAM M. THATCHER, complainants,

vs.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN AND DAVID G. ROSE, defendants.

Be it remembered, that on this day, to wit, the fifteenth day of January, in the year of our Lord one thousand eight hundred and fifty-six, of the December term, A. D. 1856, came the said complainants by Messrs. Higgins, Beckwith and Strother, their solicitors, and filed in the office of the clerk of the Circuit Court of the United States, for the Northern District of Illinois, their bill of complaint against the said defendants. Which said bill of complaint is in the words and figures following, to wit:—

To the Honorable Judges of the Circuit Court of the United States for the Northern District of Illinois.

Henry L. Burcham, George W. Marshall, Francis M. Tompkins, William Stokes, Benjamin Schrugley, Frederick Swannell, Alexander Delori, Sarah Jane Bennett, Samuel A. Lane, Olive Robesham, James Taylor, William P. Symonds, John Baum, Jacob Dutcher, Thomas Powell, Edwin R. Rowley, Galen A. H. Marcy, Lydia Todd, Abram Beadle, Jeremiah Peck, and William M. Thatcher, citizens of the State of Illinois, bring this their bill against Jonathan Crews,

Lycurgus Sherman, Mason G. Sherman, and David G. Rose, citizens of the State of Indiana.

And thereupon your orators complain and say, that by a treaty made and concluded on the Tippecanoe River, on the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and thirty-two, between Jonathan Jennings, John W. Davis and Marks Crume, Commissioners on the part of the United States, and the Chiefs and Warriors of the Potawotomies of the State of Indiana and Michigan Territory, and afterwards ratified by the President of the United States, by and with the advice and consent of the Senate of the United States, agreed to grant to one Francis Besion, one-half of section of land, to be selected by the President of the United States after the lands were surveyed, with boundaries to correspond with the public surveys, and to be conveyed to him by patent, as by reference to said treaty will more fully and at large appear.

And your orators further show that heretofore, to wit, on the 29th day of March, A. D. 1837, selection was duly made under the direction and with the approval of the President of the United States of the east fractional half of fractional section twenty-four on both sides of the Kankakee River, the fraction of the said east fractional half on the north side, containing seventy acres and eighty-eight hundredths of an acre, the fraction of said east fractional half on the south side containing an hundred and ninety-eight acres and ninety-five hundredths of an acre in township thirty-one, north of range thirteen, east of the third meridian in the district of lands subject to sale at Chicago, Illinois, to which said Bezion was entitled under said treaty. And thereupon the United States in pursuance of said treaty, afterwards on the 17th day of February, A. D. 1845, issued a patent to said Bezion bearing date the day and year last aforesaid. And therein and thereby the United States did grant unto the said Francis Bezion, and to his heirs, the land above described. To have and to hold the same unto the said Bezion and to his heirs and assigns forever, together with the appurtenances thereunto belonging, as by the said original patent now in the custody of your orators here in court ready to be produced, said more fully appear.

And your orators further show, that heretofore, to wit, on the 4th day of February, A. D. 1833, the said Francis Besaion made and entered into the following agreement in writing under his hand and seal with one William Armstrong, that is to say :—

"Whereas in and by a treaty holden and concluded by and between Jonathan Jennings, John W. Davis, and Marks Crume, commissioners on the part of the United States of the one part, and the head chiefs and warriors of the Pottawotomie nation of Indians of the other part, it was concluded and agreed, amongst other things, that there was and should be reserved and received to Francis Bezayon one-half section of land, to contain three hundred and twenty acres, to be located under the direction of the President of the

United States after said lands conveyed by said treaty have been surveyed, which said treaty has been ratified by the Senate of the United States, and the said Francis Bezayon, for his support and maintenance, being desirous of selling and disposing of his right, title, and interest in said half section of land aforesaid, reserved to him by the treaty aforesaid, confirmed and ratified by the Senate aforesaid, to William Armstrong, of Knox County and State of Indiana, for and in consideration of the sum hereafter mentioned, paid to said Bezayon, and the receipt thereof is hereby acknowledged, makes the following indenture, to wit: This indenture, made this 4th day of February, A. D. 1833, between Francis Bezayon and William Armstrong, of the county of Knox and State of Indiana, witnesseth: That the said Francis Bezayon for and in consideration of the sum of four hundred dollars lawful money of the United States to him in hand paid by the said William Armstrong, the receipt whereof is hereby acknowledged, and for and in consideration of the further sum of one hundred dollars to be paid by the said William Armstrong on the completion of a full and perfect title to said Armstrong of said half section so reserved to said Bezayon, and for which said last mentioned sum of one hundred dollars the said Armstrong has this day executed his note, bearing even date herewith to said Bezayon, the said Francis Bezayon hath, and by these presents doth give, grant, bargain, sell, alien, release, convey, and confirm unto the said William Armstrong, his heirs and assigns, the aforesaid half section of land reserved to him the said Bezayon by the treaty aforesaid, and I do hereby authorize and empower the said William, his heirs and assigns, to locate the said land after the said land is surveyed agreeably to the provisions of said treaty, and the laws of the United States, and obtain a patent therefor in his own name, and I do hereby further authorize and request the President of the United States to consent to the transfer and assignment of my interest in said half section of land reserved to me as aforesaid, and to the issuing of a patent for the same to said Armstrong, his heirs and assigns, to have and to hold unto the said William Armstrong, his heirs and assigns, the aforesaid half section of land with the appurtenances forever, hereby conveying unto the said Armstrong, his heirs and assigns, all the right, title, and interest belonging to or in anywise appertaining unto me in said half section of land, with its appurtenances; and I the said Francis Bezayon do for myself, my heirs, executors, and administrators, covenant and agree to and with the said William Armstrong, his heirs and assigns, that I will warrant and forever defend the said half section of land, reserved to me as aforesaid by the treaty aforesaid, from all claims and demands whatever, either of myself or those claiming under me as against the claims of all other persons, and that I will at any and all times hereafter, at the proper costs and charges of said Armstrong, his heirs and assigns, make and execute any and all other further deed or deeds of conveyance and transfer necessary in law to assure and

confirm unto him, said Armstrong, his heirs or assigns, a title to the aforesaid half section of land with its rights and privileges.

In witness whereof I have hereunto set my hand and affixed my seal at Vincennes, Knox County, Ind., this 4th February, 1833.

hs
FRANCIS + BEZAYON, [L. S.]
mark.

Witnesses—JNO. LAIE,
JOHN PURCELL.

And your orators further show that by said treaty only an half section of land was reserved or agreed to be granted to said Francis Bezion, and that by the agreement aforesaid the said Bezion agreed to convey to said William Armstrong the same one-half section when the title thereto should be perfected in him, the said Bezion, by the United States, agreeably to said treaty.

And your orators further show that at the time of making said agreement, the sum of five hundred dollars, therein mentioned, was the full, fair value of said land.

And your orators further show that afterwards, to wit, on the 2d day of September, A. D. 1836, the said William Armstrong, conjointly with Mary Armstrong, his wife, by an instrument in writing attached to the aforesaid agreement of said Besion, did assign, transfer, set over, and convey to one Thomas T. Benbridge all the right, title, claim, and interest of them, the said William Armstrong and Mary his wife, in and to the land mentioned in said agreement with said Besion mentioned, which said assignment was and is in the words and figures following, that is to say:—

"Know all men by these presents, that William Armstrong and Mary his wife, for and in consideration of the sum of eight hundred dollars, lawful money, to us in hand paid, the receipt whereof is hereby acknowledged, have and by these presents do give, grant, convey, transfer, assign, and set over to Thomas T. Benbridge, his heirs and assigns forever, all and singular our right, title, interest, claim, and demand of what nature whatsoever, of, in, and to the land mentioned in the deed hereunto attached, all *all* rights and claims of what nature soever, conveyed and granted to the said William Armstrong by said deed in manner mentioned therein."

In testimony whereof, we have hereunto set our hands and seals this 2d day of September, 1836.

WILLIAM ARMSTRONG. [SEAL.]
MARY ARMSTRONG. [SEAL.]

In presence of Mr. Collins as to Mary Armstrong.

And your orators further show that afterwards, to wit, on the 13th day of August, A. D. 1842, said Thomas T. Benbridge, conjointly with Ann, his wife, by a certain instrument in writing attached at that time to the original agreement of said Francis Besion, and the

assignment thereof by said Armstrong as aforesaid, assigned all his right, title, interest, claim, and demand in and to said original agreement, and the land therein mentioned and referred to, to James Mix, his heirs and assigns forever, which said instrument is in the words and figures following, that is to say:—

"Know all men by these presents, that Thomas S. Benbridge and Ann his wife, for and in consideration of the sum of one thousand nine hundred dollars, lawful money, to us in hand paid, the receipt whereof is hereby acknowledged, and by these presents do give, grant, convey, transfer, assign and set over to James Mix, his heirs and assigns, forever, all and singular our right, title, interest, claim and demand of what nature soever, of, in, and to the land mentioned in the deed hereunto attached, all the rights and claims of what nature soever, conveyed and granted to the said Thomas T. Benbridge and Ann his wife, by the foregoing deed and assignment.

In testimony whereof, we have hereunto set our hands and seals this 13th day of August, A. D. 1842.

THOMAS T. BENBRIDGE. [SEAL.]
ANN BENBRIDGE. [SEAL.]

DAVID RUNNION,
JASPER BRADLEY.

And your orators further show that said agreement of said Besion so made as aforesaid, together with the said assignments attached thereto, were afterwards, to wit, on the day of A. D. 18—, recorded in the recorder's office of Iroquois County in the State of Illinois, where said lands were then situated, and that the same were afterwards, to wit, on the day of A. D. 18—, and after a division of said Iroquois County, duly recorded in the recorder's office of the county of Will, where such lands, by such division as aforesaid, became and were situated.

And your orators further show that said James Mix, afterwards, to wit, on the day of A. D. , made, executed, acknowledged and caused to be recorded in the recorder's office of Will County aforesaid, a subdivision of all that part of the above tract of land lying south of the Kankakee River, in the manner set forth upon the plat hereto annexed.

And your orators further show that the said James Mix, afterwards on the 3d day of July, A. D. 1854, by his deed of that date, executed conjointly with his wife, Helen M., conveyed and confirmed unto your orator, Lydia Todd, all their right, title and interest to said premises, as by the said deed now in the custody of said Lydia Todd, here in court ready to be produced, will more fully appear.

And your orators further show that before that time said James Mix conveyed all his right and title to lot three in block forty-four, and that the same has become vested in your orator, Henry L. Burcham, and that before that time, that is to say, before the conveyance so made as aforesaid to your orator, Lydia Todd, said Mix conveyed

all his right and title to sixty feet off the north end of lot one in block forty-three, and the same became vested in your orator, George W. Manhall, and that before that time said James Mix conveyed all his right and title to fifty feet off the south end of lot one in block forty-three, and the same became vested in your orator, Frederick Swannell, and that before that time said Mix conveyed all his right and title to lot 3 in block forty-three, and the same became vested in your orator, Francis M. Tompkins, except so much of lot three in block forty-three as is vested in said Frederick Swannell as aforesaid, and except so much of said lot three in block forty-three as might be necessary for the use of a water privilege, or for the purposes of navigation, and that before that time said Mix had conveyed his right and title to that part of lot one in block forty-three commencing fifty feet from the southeast corner of said lot, and running thence north on Range Street thirty feet, thence west to the alley, thence south on the alley thirty feet, thence east to the place of beginning, and that the same became vested in your orator, William Stokes; and that before that time said Mix had conveyed all his right and title to lot four on block forty-three, and the same became vested in your orator, Benjamin Schrugley; and that before that time said Mix conveyed all his right and title to block seventy-eight, and to three feet off the north side of lot five in block forty-three, and the same became vested in your orator, Frederick Swannell; and that before that time said Mix conveyed all his right and title to lot two in block forty-four, and the same became vested in your orator, Alexander Delori; and that before that time said Mix conveyed all his right and title to lot six in block forty-four, and the same became vested in your orator, Sarah Jane Bennett; and that before that time said Mix conveyed all his right and title to lot one in block fifty-seven, and the same became vested in your orator, Samuel A. Lane; and that before that time said James Mix conveyed all his right and title to lot three in block fifty-seven, and the same became vested in your orator, Olive Robesham; and that said James Mix before that time conveyed all his right and title to lot five in block fifty-seven, and the same became vested in your orator, Francis Taylor; and that before that time said James Mix conveyed all his right and title to lot eight in block fifty-seven, and the same became vested in your orator, William P. Symonds; and that before that time said James Mix conveyed all his right and title to lot eight in block fifty-eight, and the same vested in your orator, John Baum; and that said James Mix before that time conveyed all his right and title to lots five and eight in block sixty-one, and that the same became vested in your orator, Jacob Dutcher; and that before that time said James Mix conveyed all his right and title to lot seven in block sixty-one, and that the same became vested in your Thomas Powell; and that said James Mix, before that time conveyed all his right and title to lot eight in block seventy-seven, and the same became vested in your orator, Edwin R. Rowley; and that said

James Mix before that time conveyed all his right and title to block ninety-eight, and the same became vested in your orator, Galen A. Marcy, by virtue of a contract which said Marcy holds therefor; and that before that time said James Mix had conveyed all his right and title to parts of block ninety-nine, which parts have become vested in your orators, Abram Beedle, Frederick Swannel, Jeremiah Peck, John Baum, and William M. Thatcher, respectively, as by the said deeds of conveyance here in court ready to be produced, will more fully appear.

And your orators further show that the said James Mix and his said several grantees severally entered into possession of the several tracts and parcels of said half section so granted and held by them as aforesaid, and that they, their grantees, and your orators, have had the sole and exclusive possession of said half section of land for many years, and while in such possession, have made large and valuable improvements upon the same by the erection of dwelling-houses, barns, and other buildings, and by putting up fences upon the same, and for many years have paid all taxes and assessments assessed upon said lands and lots; and that such possession and acts of ownership have been open and notorious, and were so at the time of and long before the conveyances to the defendants hereinafter mentioned.

And your orators further show that Francis Besion, in or about the year 1843, died intestate, and that afterwards, to wit, on the 29th day of April, A. D. 1853, one Asnick, claiming to the sister and sole heir of said Francis Besion, deceased, by her deed of that date conveyed and confirmed unto the said defendants, Jonathan Crews and Lycurgus Spencer, all her right and title to said half section of land, and that said Jonathan Crews and Lycurgus Sherman afterwards, on the day of , A. D. 185 , by their deed of that date, conveyed and confirmed unto said Mason G. Sherman and David G. Rose an undivided half of the right, title, and interest of said Jonathan Crews and Lycurgus Spencer to said premises; and that afterwards, to wit, on the 16th day of December, A. D. 1854, James A. Ducham and Eugenie Ducham, wife of said James A. Ducham, claiming to be the heirs of said Francis Besion, or his representatives, by their deed of that date conveyed and confirmed unto said Jonathan Crews and Lycurgus Sherman, the said defendants, all their right, title, and interest in said premises; and that afterwards, to wit, on the 29th day of April, A. D. 1853, one Joseph A. Bosorassa and Asnick, his said wife, claiming to be the sister and sole heir of Francis Basion, deceased, by their deed of that date conveyed and confirmed unto the said Jonathan Crews and Lycurgus Sherman, defendants aforesaid, all their right, title, and interest to said premises, as by the record of said deed will more fully appear.

And your orators further show that neither said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, nor David G. Rose, have any title to said premises, or claim to have any title thereto or any

part thereof, except such as they have derived under said Asnick as aforesaid.

And your orators further show that neither said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, nor said David G. Rose, have any title to said premises, or claim to have any title thereto, or any part thereof, except such as they have derived under said Asnick as aforesaid.

And your orators further show that said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, respectively, at the times when the several conveyances were made to them under which they claim title as aforesaid, had notice of all the facts hereinbefore set forth, which had then transferred and took said conveyances with full knowledge of the same and of the equitable rights of your orators and their grantors in the premises; and further, that such conveyances were procured by said defendants, or some of them, from said Asnick, and from the other grantors in said conveyances named, for a nominal sum when compared with the value of said property, and for the purpose of speculation upon the bona fide possession of your orators and their grantors.

And your orators further show that said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, on the day of October, A. D. 1855, being on one of the days of a term of the Circuit Court of the United States for the Northern District of Illinois, held on the day of October, in said year, commenced their action of ejectment against your orator, Lydia Todd, wherein they seek to recover from the said Lydia Todd the possession of the whole of said premises, with other property, which said suit is now at issue and pending in said court.

And your orators well hoped that the said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose would have ceased to prosecute their said action of ejectment, and would have released to your orators, according to their several rights, all the right, title, claim, and demand of them the said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose in and to said premises and every part thereof; but they the said defendants not only refuse so to do, but threaten to take forcible possession of said premises and to dispossess your orators of the same, and to commence other suits against some of your orators for the recovery of the possession of said premises.

To the end, therefore, that the said defendants may, if they can, should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to their best and utmost of their several and respective knowledge, remembrance, information, and belief, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that as fully and particularly as if the same were here again repeated, and they thereunto particularly interrogated.

And your orators pray that said defendants, their attorneys, agents, and servants may be perpetually enjoined from prosecuting said suit at law against your said orator, Lydia Todd, so far as the same relates to said premises or any part thereof, and that said defendants may be decreed by such fit and proper conveyances as to your Honors shall seem meet, to release unto your orators according to their several and respective rights, all the rights, title, interest, claim, or demand of said defendants or either of them to, or demand of said defendants or either of them, to said premises, and every part thereof. And in the meantime that said defendants, their attorneys, agents, and servants, may be restrained from further prosecuting said action of ejectment so far as the same relates to said fractional half of section twenty-four in township thirty-one, north range, thirteen east of the third principal meridian, and from commencing any other suit or suits against any of your orators for the recovery of said premises or any part thereof, and from in any manner intermeddling with the possession of said premises or any part thereof, until the further order of your Honors, and that your orators may have such other and further relief in the premises as justice and equity and the nature of their case may require.

May it please your Honors, the premises considered, not only to grant unto your orators the most gracious writ of injunction of the United States of America, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, their attorneys, agents, and servants, restraining them as aforesaid, but also the most gracious writ or writs of subpœna of the United States of America, to be directed to the said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, and their confederates, thereby commanding them and every of them at a certain day, and under a certain pain therein to be specified, personally to be and appear before your Honors in this Honorable Court, and then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your Honors shall seem meet.

By their solicitor,
C. BECKWITH.

United States of America, Northern District of Illinois, ss.

William A. Chatfield being duly sworn, says, that he has heard read the foregoing bill and knows the contents thereof, and that he has information as to all the matters therein stated, and from such information believes such matters to be truly stated therein, and that said bill is true. That deponent is the attorney in fact for the said complainants in said bill named, for the purpose of filing the same, and that he knows more of the matters and things therein stated and set forth, than said complainants or either of them, and therefore he verifies the same.

WM. A. CHATFIELD.

Sworn to and subscribed before me this 15th day of January, A. D. 1856. WM. H. BRADLEY, Clerk.

(Here follows plat, see original, page 31.)

Endorsed, filed January 15th, 1856.
WM. H. BRADLEY, Clerk.

And afterwards, to wit, on the fourteenth day of May, in the year of our Lord one thousand eight hundred and fifty-six, in the May adjourned term, A. D. 1856, came the said defendants, by Messrs. Smith and Liston, their solicitors, and filed in the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, their demurrer to the foregoing bill of complaint, heretofore filed herein; which said demurrer is in the words and figures following, to wit:—

United States of America, District of Illinois.

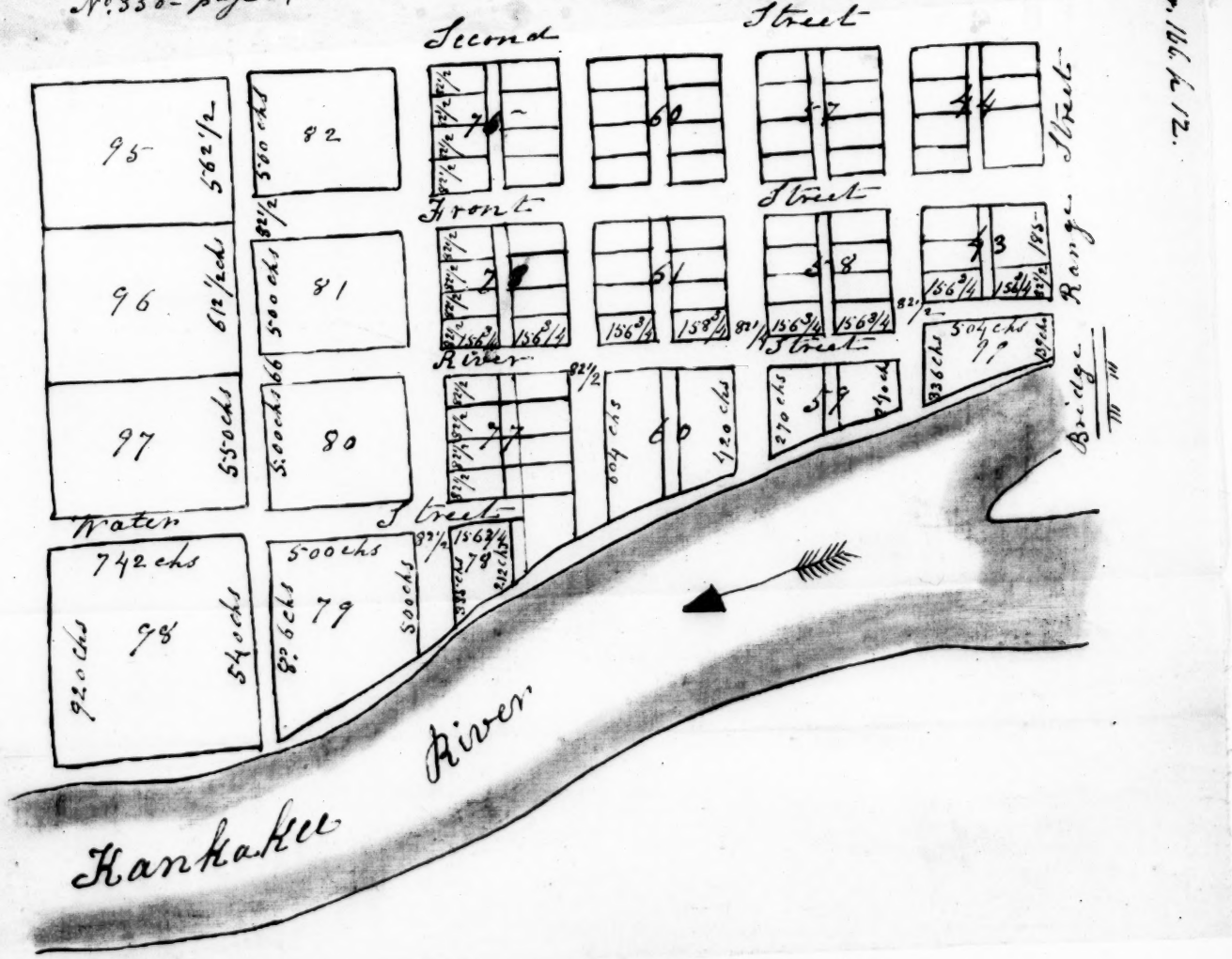
In the Circuit Court of the United States for the Northern District of Illinois.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE,
als.
HENRY L. BURCHAM, GEORGE W. MARSHAL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SHIGLEY, FREDERICK SWANNELL, ALEXANDER DELORI, SARAH JANE BENNETT, SAMUEL A. LANE, OLIVE ROBISHAM, JAMES TAYLOR, WILLIAM P. SYMONDS, JOHN BAUM, JACOB DUTCHER, THOMAS POWELL, EDWIN R. ROWLEY, GALEN A. MARCEY, LYDIA TODD, ABRAHAM BEEDLE, JEREMIAH PECK, and WILLIAM M. THACHER. } Chancery.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainants' bill contained to be true, in such manner and form as the same are therein and thereby set forth, do demur to the said bill, and for cause of demurrer show that the said complainants have not by their said bill made such a case as entitles them in a court of equity to any discovery from these defendants respectively, or any of them, or to any relief against them or either of them as to the matters contained in said bill, or any of such matters, and that any discovery which can be made by these defendants or any of them touching the matters complained of in said bill, or any of them, cannot be of any avail to the said complainants for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainants to any relief in this court, touching any of the matters therein complained of.

And these defendants show to the court the further cause of demurrer, that said bill has not appended, or attached thereto, or con-

No. 330 - page 31



Nov. 1866 p. 12.

tained therein, any distinct interrogatories, as required by the rules of this court.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

SMITH & LISTON,
Solicitors for Defendants.

State of Illinois, Cook County, ss.

In the Circuit Court of the United States for the Northern District of Illinois.

Personally came into open court on this 14th day of May, 1856, Jonathan Crews, one of the within-named defendants, and, after being duly sworn, upon his oath says that the foregoing demurrer is not interposed for delay, and further says not.

JONATHAN CREWS.

Subscribed and sworn to in open court this 14th day of May, 1856. WM. H. BRADLEY, Clerk.

Mr. Smith and Liston, counsel for the above defendants, do hereby certify that, in our opinion, the above demurrer is well founded in point of law. SMITH & LISTON,

May 14th, 1856. Sol'rs for Def'ts.

Endorsed, Filed May 14th, 1856.

WM. H. BRADLEY, Clerk.

And afterwards, to wit, the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, in the October adjourned term, A. D. 1857, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:—

LYDIA TODD, HENRY L. BURCHAM et al.
vs.
JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE. } In Chancery.

The court having fully considered, and being now fully advised upon the demurrers of the defendants heretofore filed by their attorney to the complainants' bill, overrules the same, and on motion of the defendants, by their counsel, they have leave to answer the complainants' bill within thirty days.

And afterwards, to wit, on the sixteenth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, in the December term, A. D. 1857, the aforesaid defendants, by Messrs. Arnold, Larned, Smith, and Liston, came into the office of the clerk of the Circuit Court of the United States for the Northern District

of Illinois, and filed their answer to the foregoing bill of complaint, heretofore filed herein; which said answer is in the words and figures following, to wit:—

In the Circuit Court of the United States for the Northern District of Illinois.

HENRY L. BURCHAM, GEORGE W. MARSHALL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SCHRUGBY, FREDERICK SWOMELL, ALEXANDER DELORI, SARAH JANE BENNETT, SAMUEL A. LANE, OLIVE ROBISHAM, JAMES TAYLOR, WILLIAM P. SYMONDS, JOHN BAUM, JACOB DUTCHER, THOMAS POWELL, EDWIN R. ROWLEY, GALEN A. MARCY and LYDIA TODD, ABRAM BEEDLE, JEREMIAH PECK, and WILLIAM M. THACHER, Complainants,
ag't
JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE, Defendants.

In Chancery.

The joint and several answer of Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, defendants, to said complainants' bill of complaint:—

These defendants, now and at all times hereafter, reserving to themselves all benefit of exception which can be taken to the many errors, uncertainties, insufficiencies and imperfections in the complainants' bill of complaint contained, for answer thereto, or to so much and to such parts as these defendants are advised is material or necessary, answering, say:—

They admit the making and ratification of said treaty. They also admit that by the provisions of said treaty the United States agreed to grant to said Francis Beson one-half section of land, to be selected under the direction of the President of the United States, after the lands should have been surveyed, and the boundaries thereof to correspond with the public surveys, and to be conveyed by the United States by patent, as by reference to said treaty will now fully appear. The defendants also admit that on the 29th day of March, A. D. 1837, selection was made under the direction of the President of the United States of the east fractional half of fractional section twenty-four (24), on both sides of the Kankakee River; the fraction of the said east fractional half on the north side of the river, containing seventy acres and eighty-eight hundredths of an acre (70.88 acres). The fraction of said east fractional half on the south side of the river containing one hundred and ninety-eight acres and ninety-five hundredths of an acre (198.95), all in township thirty-one (31), north of range thirteen (13), east of the third (3) principal meridian in Illinois, which said land was selected for the purpose of fulfilling said

treaty stipulation of agreeing to grant a half section of land to said Francis Bezion; but these defendants expressly deny the charge in said bill that the said land was *the land* to which said Bezion was entitled under said treaty, and they deny that Besion was entitled by the provisions of said treaty to any specific lands whatever, and they deny that he ever had any estate or vested interest in said lands whatever, as they aver that they are informed and believe, and, therefore, charge it to be true that the said Francis Besion deceased on the day of A. D. 1842; and they further charge that the patent from the United States for said lands did not issue until the 17th day of February, A. D. 1845, bearing said date; and these defendants deny that the United States therein and thereby did grant unto the said Francis Besion the above described land, but, on the contrary thereof, these defendants aver that the said grant was not made by the United States until the date of the said patent, and that said patent is the grant itself, and that when the said grant was made, it was made to Asnick, a Potawottomie woman, and Eugenia Duchane, a half-breed Potawottamie woman, the half sister of the said Francis Besion, bearing the relation of heirs to the said Francis Besion, and being the sole heirs of the said Francis Besion, and which said heirs then and there took the grant, as purchasers, from the United States, and not by inheritance nor by descent from the said Francis Besion, in virtue of the provisions of the act of Congress of the 20th May, A. D. 1836, and the operation of law, the said Francis Besion having deceased before the date of said patent, the title to the said land therein enured to, and became vested in his said heirs, as the grantees, in fulfilment of the said treaty stipulation of the United States, by which they agreed to make a grant of land, after the President should have selected it. And these defendants deny that Francis Besion ever had any assignable or transferable estate, right, title, interest, claim, or demand whatever, of, in, or to the said tract of land, or to the said tract of land or to any part or parcel thereof whatever, recognizable in any court of law or equity.

These defendants say it may be true that the said complainants may have the custody of the said patent, but these defendants aver that they are informed and believe that their possession of said patent is tortious and without any lawful authority whatever; and these defendants therefore pray that this Honorable Court may order and decree the said complainants to deliver up the said patent into the custody of the clerk of this Honorable Court, for the purpose of being delivered to the person or persons legally entitled to possession of the same.

These defendants further answering, say that they had no knowledge nor information, until after the fee simple of the land in controversy had been vested in them, of the pretended written agreement of the 4th day of February, A. D. 1833, pretended to have been made by the said Francis Besion with one William Armstrong, as charged in said bill, and can form no belief about it, and require of

the said complainants strict proof thereof. And these defendants expressly deny the statement as it purports to be recited in the said pretended agreement, that, by said treaty, "it was concluded and agreed, amongst other things, that there was and should be reserved and secured to Francis Besion one-half section of land to certain three hundred and twenty acres (320 a.);" as these defendants deny that any reservation of land was ever made to said Francis Bezayon, in any treaty that these defendants have any knowledge or information of. But these defendants say, that by the provisions of the Third Article of the said Treaty of Tippecanoe River, of the 27th day of October, A. D. 1832, the United States agree to grant to Francis Besion one-half section of land, which shall be selected under the direction of the President of the United States after the lands shall have been surveyed, and the boundaries to correspond with the public surveys, and which lands shall be conveyed by patent; reference to said treaty will more fully appear. And these defendants expressly deny all other knowledge or information respecting any other or different interest that the said Francis Besion had, or claimed to have, in any lands whatever, or to the expectancy of any interest in any lands under any other treaty, or in any other manner; and they require of the complainants strict proof of the contrary.

These defendants further say, that the lands in controversy are not embraced in the treaty of Tippecanoe River of the 27th of October, A. D. 1832, and therefore could not have been reserved to Francis Besion; but it will be ascertained by reference thereto, that the land in controversy is embraced in the First Article of the Treaty of Tippecanoe River, of the 20th October, A. D. 1832 (See 7th vol. p. 376, U. S. Statutes at large), by which the Indian title was extinguished to the lands in controversy fully seven days before the said treaty of the 27th October, 1832. It is thus put beyond any controversy that the land in question was not a reserve, neither can it be claimed in any manner whatever as a conveyance by treaty. It was nothing more than a promise to make a grant.

These defendants, further answering, deny that the said land in controversy, at the time of making the said supposed agreement, was not of the value of more than five hundred dollars; and these defendants, from their information and belief, deny that the said William Armstrong ever paid the said Francis Besion the said sum of five hundred dollars, and they insist upon strict proof thereof.

These defendants, further answering, say, that they had no knowledge or information until after the title of said lands in controversy had been vested in these defendants, in fee simple, of the said pretended assignment of said William Armstrong and Mary Armstrong, his wife, of the date of September the 2d, A. D. 1836, to the said Thomas T. Benbridge, as charged in said bill of complaint; and they have no knowledge nor information since of the truth of the same, except what they derive from said bill of complaint; and, therefore, can form no belief about it, and insist upon strict proof thereof.

These defendants, further answering, say, that they had no knowledge nor information, until after the title of said lands in controversy had been vested in these defendants, in fee simple, of the said pretended assignment of the said Thomas T. Benbridge and Ann his wife, of the date of the 13th day of August, A. D. 1842, to the said James Mix, as charged in the said bill of complaint; and they have no knowledge nor information since of the truth of the same, except what they derive from said bill of complaint, and such information as has emanated from the said James Mix; and, therefore, they can form no belief about it, and insist upon strict proof thereof.

These defendants, further answering, say, that they had no knowledge nor information until after the title of said lands in controversy had been vested in these defendants, in fee simple, of the said pretended recording in the Recorder's Office of the county of Iroquois, on the day of A. D. 18 , of the said pretended assignment as charged in said bill of complaint, and can form no belief about it, and the defendants insist upon strict proof thereof.

And these defendants, further answering, say, that they are informed by counsel, and verily believe, that none of said pretended instruments of writing were ever legally entitled to be recorded as charged in said bill; and they are informed by counsel, and believe it to be true, that they were not bound to examine such records, and they therefore insist upon strict proof.

And the defendants, further answering, say, they are informed and believe, and therefore charge it to be true, that no part of said land in controversy, lying north of the said Kankakee River ever was situate in the said county of Iroquois.

These defendants, further answering, say, that they had no knowledge nor information until after the title of said lands in controversy had been vested in these defendants, in fee simple, that the said James Mix, on the day of A. D. 18 , made, executed, and acknowledged, or caused to be recorded in the Recorder's Office of Will County, Illinois, a pretended subdivision of all that part of the said tract of land in controversy, lying north of the Kankakee River, in the manner professed to be set forth upon a plat professed to be annexed to the said bill of complaint. And the defendants say that they have no knowledge nor information since the fee simple of said lands in controversy was vested in them, of the truth of said charges, except what they derive from said bill of complaint; and the defendants deny that the said James Mix had any such right to do so; and they also deny that any such pretended acts of the said James Mix can, in any manner whatever, give any validity whatever to the pretended claims of the said complainants, or to either of them, to any pretended rights to equitable relief, and they can form no belief as to the truth of such charges, and insist on strict proof.

These defendants further answering say, that they had no knowledge nor information until after the title of said lands in contro-

versy had been vested in these defendants, in fee simple, of the said pretended deed of the said James Mix and Helen M., his wife, of the date of the 3d day of July, A. D. 1854, to the said Lydia Todd, as charged in said bill, and the defendants say they have no knowledge nor information of any such sale and conveyance since, except what they derive from said bill of complaint, and can form no belief as to the truth thereof, and they insist on strict proof.

These defendants further answering say, they had no knowledge nor information until after the title of the said lands in controversy had been vested in these defendants in fee simple, of the said pretended deed from James Mix to Henry L. Burcham, nor of the pretended deed from said Mix to George W. Marshall, nor of the pretended deeds from said Mix to Frederick Swannell, nor of the pretended deed from said Mix to Francis M. Tompkins, nor of the pretended deed from said Mix to William Stokes, nor of the pretended deed from said Mix to Benjamin Schrugley, nor of the pretended deed from said Mix to Alexander Delori, nor of the pretended deed from said Mix to Sarah Jane Bennett, nor of the said pretended deed from said to Mix to Samuel A. Lane, nor of the said pretended deed from said Mix to Olive Robisham, nor of the said pretended deed from said Mix to Francis Taylor, nor of the said pretended deed from said Mix to William P. Symonds, nor of the said pretended deed from said Mix to John Baum, nor of the said pretended deed from said Mix to Jacob Dutcher, nor of the said pretended deed from said Mix to Thomas Powell, nor of the said pretended deed from said Mix to Edwin R. Rowley, nor of the said pretended deed from the said James Mix to Galen A. Marcey, nor of the said pretended deeds from the said Mix to Abram Beedle, Frederic Swannell, Jeremiah Peck, John Baum, and William Thatcher, respectively; and these defendants say it may be true that the said Mix executed and delivered the said deeds as charged in said bill, but these defendants have no knowledge, except what they derive from said bill, and from parties who have settled with these defendants, as hereinafter stated; and as they can neither admit the truth of them, nor deny the same, and can form no belief about them, they require of the complainants strict proof.

These defendants further answering say, that they had no knowledge nor information until after the title of said lands in controversy had been vested in fee simple in these defendants, that the said James Mix and his said several pretended grantees, severally entered into possession of the several tracts and parcels of said half section of land, as they several claim to have been conveyed to them, and that they and their pretended grantees, and said complainants have had the sole and exclusive possession of said half section of land for many years. Neither are the said charges true, as these defendants aver, that the said James Mix and his pretended grantees could not take possession of the said land while the title remained in the United States, and before the issuing of the patent, although

they may have occupied some parts of said half section of land lying north of the Kankakee River, and these defendants say that they are informed by counsel, and believe and charge it to be true, that the occupancy of said lands by the said James Mix, and his pretended grantees, was tortious, and was a trespass, and was not a legal possession of said land.

And these defendants further answering say, that all of that portion of said half section of land in controversy, lying on the south side of the said Kankakee River, containing about one hundred and ninety-eight acres and ninety-five hundredths of an acre, never was in the occupancy of the said James Mix, nor of any of his pretended grantees, *nor of any of his pretended grantees*, to the best of these defendants' knowledge, information, and belief, neither did they, or either of them, ever make any improvements thereon; but on the contrary thereof, these defendants aver that when the title of the said half section of land became vested in them in fee simple, they found that said portion of said land lying south of the said Kankakee River wholly vacant and unoccupied, and they then and there took quiet and peaceable possession thereof, and have retained the peaceable possession thereof ever since, and which said possession these defendants had and held before the filing of, and at the time of filing the complainants' said bill of complaint; and these defendants further aver that they have fenced over one hundred and sixty acres of said land thus in their possession, and have the same in cultivation, and now occupy the same by their tenant.

These defendants further answering say. They admit there are some improvements on some parts of said land lying north of the said Kankakee River, that were not made by these defendants, but they have no knowledge nor information except what they derive from the said bill of complaint (except as is hereinafter stated) as to who made said improvements and built said buildings on said land on the north side of the Kankakee River, and can form no belief about it; and require of the complainants strict proof. And as to the improvements made on the part of said land, north of the Kankakee River, by Galen A. Marcy, these defendants say he made them since the title of said land was vested in the defendants in fee simple, and against the express orders of these defendants.

And these defendants further answering say. As to such parts of the land claimed by the complainant, Jacob Dutcher, Benjamin Schiegley, Frederick Swannell, and William Stokes, these defendants, aver that before the filing of said bill of complaint, they purchased those parcels of land of these defendants which are respectively claimed for them in said bill of complaint, and have severally received from these defendants title bonds for the execution of deeds; the said Swannell and Stokes have each received deed from these defendants of conveyance for their respective parcels of said land claimed for them in said bill of complaint, and have each paid these defendants part of the purchase-money, and have executed and delivered these

defendants their respective promissory notes for the payment of the remainder of the purchase-money, and which said promissory notes these defendants now hold in their possession, and said Dutcher and Schiegley still hold the defendants' title bonds for deeds.

And these defendants further aver. That they are informed and believe that the names of the said Dutcher, Shiegley, Swannell and Stokes, have been inserted in said bill of complaint at the instance of the said James Mix, and without the knowledge or consent of the said Dutcher, Schrigley, Swannell, and Stokes, or of either of them, for the purpose of harassing and defrauding these defendants.

These defendants further answering say. As to the said parcel of said land claimed in said bill of complaint, for the said complainant George W. Marshal, he, the said Marshall, before the filing of the said bill of complaint purchased of these defendants the said parcel of said land, and the defendants executed and delivered to said Marshal their quitclaim deed for the same, and the said Marshall received said deed; and these defendants believe that said Marshall, Swannell, and Stokes, have had the deed recorded in the proper recorder's office in the said county of Kankakee, where said land is situate; and the said Marshall then and there paid said defendants part of the purchase-money, and then and there executed and delivered his promissory note and his mortgage on the said parcel of land to these defendants, to secure the balance of said purchase-money, and which said mortgage these defendants have had duly recorded in the county of Kankakee, and said mortgage and note are still in the possession of these defendants.

And these defendants further answering say; That they are informed and believe that the name of said Marshall has been inserted in said bill of complaint at the instance of the said James Mix, and without the knowledge or consent of the said Marshal, for the purpose of harassing and defrauding these defendants.

And the defendants say. As to said parcel of said land claimed in said bill for said complainant Sarah Jane Bennett, they, the said defendants, before the filing of said bill, voluntarily executed and delivered to said Sarah Jane Bennett a quitclaim deed without any valuable consideration for the said parcel of land claimed for her in said bill of complaint, and the said Sarah Jane Bennett then and there received said deed, and has ever since retained the same, and these defendants believe that the same has been duly recorded in the said county of Kankakee.

And these defendants further say. That they are informed and believe that the name of the said Sarah Jane Bennett has been inserted in said bill of complaint at the instance of the said James Mix, and without the knowledge or consent of the said Sarah Jane Bennett, for the purpose of harassing and defrauding these defendants.

These defendants further answering, say, as to the charge of paying taxes in said bill of complaint, these defendants have no knowledge nor information, except what they derive from said bill of

complaint, and can form no belief about it, but say as to said charges in said bill of the complainants' pretended possession, and acts of pretended ownership being open and notorious, these defendants deny that they were acts of ownership, or that these defendants were bound to take notice of them, as charged by said complainants in their said bill of complaint, and insist on strict proof. And these defendants admit that the said Francis Besion died intestate in or about the year A. D. 1842.

These defendants, further answering, say, they admit that one Asnick, a Potawatomie woman, and one Eugenia Duchane, a half blood Potawatomie woman, were the sole heirs of the said Francis Besion, and were his half sisters. And they further admit that the said Asnick, on the 29th day of April, A. D. 1853, executed, acknowledged and delivered to the defendants, Jonathan Crews and Lycurgus Sherman, her deed of conveyance for said land in controversy, which deed, duly acknowledged and certified, was afterwards, on the 27th day of May, 1853, duly recorded in the recorder's office of Will County, Illinois, in book No. 29, at pages 253 and 254, and afterwards, on the 1st day of June, 1853, said deed was also duly filed for record, in the recorder's office of Iroquois County, Illinois, and was duly recorded therein on the 12th day of June, 1853, in Book F, pages 317 and '18, a copy of which said deed and certificates of acknowledgment and authentication and recorder's endorsements thereon, was as follows, to wit:—

This indenture, made and entered into this twenty-ninth day of April, A. D. 1853, by and between Asnick, sister and sole heir of Francis Besion, of the Potawatomies Nation of Indians, of the first part, and Jonathan Crews and Lycurgus Sherman, of La Porte County, in the State of Indiana, of the second part, *witnesseth*, that the said party of the first part, for and in consideration of the sum of four hundred dollars, in hand paid by the said party of the second part to the said party of the first part before the delivery hereof, hath bargained, sold, aliened and conveyed, and by these presents doth bargain, sell, alien and convey to the said party of the second part, their heirs and assigns forever, all that certain tract of land, situate and being in the counties of Will and Iroquois in the State of Illinois, and described as follows, to wit: The east half of section twenty-four (24) in township thirty-one (31) of range thirteen (13) east, containing three hundred and twenty acres, more or less, which said land was reserved to the said Francis Besion by a treaty of 1832, and ratified by the United States in the year 1833, and which was patented to the said Francis Besion on the 17th day of February, 1845, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining; and the said party of the first part doth hereby covenant and agree to and with the said party of the second part that at the time of *of* the delivery hereof, the said party of the first part is the lawful owner of the above granted tract of land, and

seized thereof in fee simple absolute, and that she will warrant and defend the same against the claim or claims of all persons whatsoever, to and with the said party of the second part, their heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set her hand and seal, the day and year above written.

her
(Signed) ASNICK, × [SEAL.]
mark

Attest—M. L. CLIFFORD,
J. F. FENTON,
S. N. BOWRASSA, Inter't.

State of Missouri, Jackson County, ss.

Be it remembered, that on the twenty-ninth day of April, 1853, personally appeared before the undersigned, a justice of the peace within and for said county, Asnick, proved by the testimony of Jas. N. Bowrassa and Peter, to be the sister and sole heir of Francis Besion of the Potawotomie Nation of Indians, and acknowledged the above instrument of writing to be her act and deed for the purposes herein mentioned. And I further certify that the foregoing acknowledgment is taken in accordance with the laws of this State.

(Signed) ELIJAH M. McGEE, J. P.
Justice of the Peace.

State of Missouri, Jackson County, ss.

I hereby certify that Elijah M. McGee, Esq., before whom the foregoing acknowledgment was made, and who has thereunto subscribed his name, was, at the time of so doing, a Justice of the Peace in and for said county, duly commissioned and sworn, and full faith and credit is due to all his acts as such Justice, and his said certificate is in due form of law, and his signature thereto is genuine.

In testimony whereof I have hereunto set my hand, and affixed my seal of office as clerk of the Circuit Court of said county at office in the city of Independence, this 30th day of April, A. D. 1853.

[L. s.] (Signed) SAM'L D. LUCAS, Clerk.

The foregoing deed was acknowledged in my presence, and was fully explained.

May 19, 1853.

(Signed) FRANK W. LEA, Indian Agent.

No. 16,108.

State of Illinois, Will County, ss.

Recorded in the Recorder's Office of said county, May 27, 1853, at 10 o'clock A. M., in Book No. 29, at pages 253 and 254.

R. E. BARBER, Recorder.

Filed for record June 1, 1853, at 5 o'clock P. M.

JESSE BENNETT, Recorder.
By FRANK BLADER, Dep'ty.

Recorded June 12th, 1853, in Book F, pages 317–18.
JESSE BENNETT, Recorder.
By FRANK BLADER, Dep'ty.

These defendants further answering admit, that on the eleventh day of June, A. D. 1853, the said Jonathan Crews and Lycurgus Sherman, by their deed of that date, conveyed unto the said Mason G. Shermon and David G. Rose, an undivided half of all the right, title, and interest of the said Jonathan Crews and Lycurgus Sherman to said lands in controversy, which said deed was duly recorded in the county of Kankakee, Illinois, on the 3d day of February, A. D. 1854, in Book No. 1, at page 334, reference thereto will more fully appear.

These defendants admit, that on the 16th day of December, A. D. 1854, the said Eugenia Duchane, jointly with her husband, James Duchane, by their deed of conveyance of that date, duly executed, acknowledged, and delivered, conveyed and confirmed unto the said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, all the right, title, and interest of the said James A. Duchane and Eugenia Duchane, his wife, in the said lands in controversy, which said deed and acknowledgment was afterwards, on the 30th day of December, A. D. 1854, duly recorded in the Recorder's Office of Kankakee County, Illinois, in Book No. 6 of Deeds, pages 330 and 331, a copy of which said deed and certificate of acknowledgment and Recorder's endorsement thereon, are as follows, to wit:—

This indenture, made and entered into this 16th day of December, A. D. 1854, between James A. Duchane and Eugenia Duchane, his wife, of the county of Kron, and State of Indiana, of the first part, and Jonathan Crews, Mason G. Sherman, Lycurgus Sherman, and David G. Rose, of the county of La Porte, and State of Indiana, of the second part, witnesseth—

That the said party of the first part, for and in consideration of the sum of five hundred dollars, good and lawful money, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, doth give, grant, bargain, and sell, and by these presents hath given, granted, bargained, sold, and conveyed unto the said party of the second part, their heirs and assigns forever, the following described real estate, situate and being in the county of Kankakee, and State of Indiana, viz: the east half ($\frac{1}{2}$) of section No. (24) twenty-four, in township No. (31) thirty-one, and in range No. (13) thirteen east, containing three hundred and twenty acres, be the same more or less. The grantors' interest in the above described tract of land, and hereby conveyed by quitclaim, being all their right, title, and interest in the same, as heirs of Francis Besion, late of Knox County, State of Indiana, deceased, and it being the same land that was reserved to the said Francis Besion at the Tippecanoe treaty, October 27, 1832, between the United States

Government and the Potawotomie tribe of Indians, and agreeable to the stipulations of said treaty to the said Francis Besion by the said United States, in February, 1845, was patented. To have and to hold the same unto the grantees, their heirs and assigns forever, by as sure and perfect title as it is possible for the grantors to convey the same.

In witness whereof, the said party of the first part have hereunto set their hands and affixed their seals this the day and year first above written. J. A. DUCHANE. [SEAL.]

her
EUGENIA × DUCHANE. [SEAL.]
mark.

Attest, N. USHER,
JNO. C. PALMER.

State of Illinois, Knox County, ss.

Personally appeared before me, the undersigned notary public, in and for the said county, the above named James A. Duchane and Eugenia Duchane, who are personally known by me to be the grantors in the foregoing conveyance, and to have executed the same in my presence, this day acknowledged the foregoing instrument to be their voluntary act and deed for the purposes therein expressed; and the said Eugenia, wife of the said James, being examined separate and apart from her said husband, and the contents of the foregoing instrument having by me first been made known to her, acknowledged the same to be her voluntary act and deed for the purposes therein expressed.

I further certify that this acknowledgement is taken in accordance with the laws of the State of Indiana.

Witness my hand and official seal this 16th day of December, A. D. 1854. NATH'L USHER. [L. S.]

No. 932.

The State of Illinois, Kankakee County.

This instrument was filed for record on the 30th day of December, A. D. 1854, at 11 o'clock A. M., and recorded in Book No. 6 of deeds, pages 330 and 331. P. WORCESTER, Recorder.
By N. CHESTER, Dep't.

These defendants further answering admit, that the said Asnick, jointly with her husband, the said Joseph N. Bowrassa, on the 29th day of April, A. D. 1853, by their deed of that date, duly executed and acknowledged said deed on the 28th of July, A. D. 1855; at this last date delivered and conveyed to the said Jonathan Crews and Lycurgus Sherman all their right, title, interest, claim, and demand to the said lands in controversy, which said deed and acknowledgment, and authentication, was afterwards, on the 5th day of September, 1855, duly recorded in the recorder's office of Kankakee County,

Illinois, in Book No. 8, pages 318 and 19, a copy of which said deed and acknowledgment, and authentication, and recorded endorsement thereon, are as follows, to wit:—

This indenture, made and entered into this twenty-ninth day of April, A. D. 1853, by and between Joseph A. Bowrassa, and Asnick, his wife, sister and sole heir of Francis Besion, of the Potawotomie Nation of Indians, in right of the said Asnick, party of the first part, and Jonathan Crews and Lycurgus Sherman, of La Porte County, in the State of Indiana, of the second part: *Witnesseth*, that the said parties of the first part, for and in consideration of the sum of four hundred dollars in hand paid, by the said parties of the second part, to the said parties of the first part before the delivery hereof, have bargained, sold, aliened and conveyed, and by these presents do bargain, sell, alien and convey to the said parties of the second part, their heirs and assigns, forever, all that certain tract of land situate and being in the Counties of Will and Iroquois, in the State of Illinois, and described as follows, to wit: the east half of section twenty-four (24), in township thirty-one (31), of range thirteen (13) east, containing three hundred and twenty acres more or less, which said land was reserved to the said Francis Besion, by a treaty of 1832, and ratified by the United States in the year 1833, and which was patented to the said Francis Besion, on the 17th day of February, 1845, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year above written.

(Signed) JOS. A. BOWRASSA, [SEAL.]
her
ASNICK, her + mark. [SEAL.]
mark
SAMUEL L. BERTRAND.

On this 28th day of July, in the year of our Lord one thousand eight hundred and fifty-five, before me, John Horner, a Justice of the Peace in and for the 3d District of Kansas Territory, personally came Joseph N. Bowrassa, Asnick, his wife, Potawatomie Indians, and over the age of twenty-one years, and known to me as the identical persons who executed the foregoing deed, and they severally acknowledged the execution of the foregoing deed, for the uses and purposes therein mentioned.

(Signed) JOHN HORNER, Justice of the Peace
for the 3d District, Kansas Territory.

Attest—THOMAS & STINSON.
W. M. NEIL.

Shawnee Mission, Secretary's Office, Kansas Territory,
July 30th, 1855.

I, Daniel Woodson, Secretary of the Territory of Kansas, do hereby certify, that the above named John Horner, was an acting Justice of the Peace in and for the third District of Kansas Territory, on the twenty-eighth day of July, 1855, and as such competent to take acknowledgements of deeds, depositions, &c.

Witness my hand and the seal of the Territory, this thirteenth day of July, A. D. 1855.

[SEAL.] (Signed) DAN. WOODSON,.
Sec'y Kansas Territory.

No. 1653.

State of Illinois, County of Kankakee.

Filed for record September 5th, 1855, and duly recorded in book 8, pages 318 and '19.

(Signed) PHILIP WORCESTER, Recorder.
By W. BONFIELD, Dep.

And these defendants admit and aver that by said conveyances, the title to said land in controversy is vested in them in fee simple, and they further deny, according to the best of their knowledge, information, and belief, that the said Francis Besion had any other heirs than the said Asnick and the said Eugenia Duchane living when the fee simple of said land became vested in these defendants, and these defendants deny the charge in said bill that neither of these defendants have any title to said premises, or claim to have any title thereto or any part thereof, except such as they have derived under the said Asnick, but on the contrary, these defendants have hereinbefore set forth their title and how it is derived.

These defendants, further answering, deny and say it is not true, as charged in complainants' bill, that these defendants respectively, at the time and times when the several conveyances were made to them, under which they claim title as aforesaid, had notice of all the facts (as complainants call their statements in their bill) thereinbefore set forth, which had then transpired, and took said conveyances with full knowledge of the same, and of the pretended equitable rights of the complainants and their grantors in the premises. And these defendants say that they are false charges against these defendants.

These defendants, further answering, deny that any of the conveyances were made to them for a nominal sum; but, on the contrary, they were made bona fide, and for a valuable consideration, as these defendants had a legal right to do; and these defendants say that, according to the best of their knowledge, information, and belief, neither of the said complainants ever had any legal possession of the said lands in controversy, nor of any part thereof, except

such of said complainants as have derived their right of these defendants as hereinbefore set forth.

These defendants, further answering, admit they have brought their action of ejectment, and that the same is at issue and is still pending, as charged in said bill; and they aver that they intend to prosecute it, if necessary, to final judgment, with as little delay as possible.

And the defendants deny that the said complainants, or either of them, are entitled to any relief whatever in equity, as prayed for in their said bill of complaint, or otherwise. And they also deny that there is any privity of contract or privity of estate between the said complainants and their grant, or either of them, and the said Asnick and Eugenia Duchane, or between the said Asnick and Joseph N. Bosorassa, her husband, and Eugenia Duchane and James H. Duchane, her husband, or between these defendants, or between either, or between any of them; neither is there any privity of estate between the said complainants and their grantors, or any or either of them, or their pretended claim or claims of right or title, or any or either of them, and the said lands in controversy, or to any part thereof.

And these defendants further say that, by an act of the legislature of the State of Illinois, known as an act for the prevention of frauds and perjuries, it is amongst other things enacted that no action shall be brought whereby to charge any person upon any contract of or for any lands, tenements, and hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note in writing shall be signed by the said party to be charged therewith, or some other person by him lawfully authorized; and these defendants insist upon the said statute, and claim the same benefit as if they had pleaded the same.

And these defendants insist that the said paper writing of the date of the 4th day of February, A. D. 1833, purporting to have been executed by the said Francis Bezayon to the said William Armstrong, for the pretended sale of the said half section of land, and which is the foundation of this suit, and upon which this action is brought, is null and void by the provisions of the said statute of frauds; and these defendants insist that no suit whatever can be sustained thereon.

And these defendants deny that the said complainants, and each and every of them, are entitled to any relief whatever, as prayed for in their said bill of complaint.

And the defendants deny all and all manner of unlawful combination and confederacy charged without this, that there is any other matter, cause, or thing in the said complainants' bill of complaint contained, material or necessary for the defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the know-

ledge, information or belief of these defendants. All which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf wrongfully sustained.

JONATHAN CREWS,
LYCURGUS SHERMAN,
MASON G. SHERMAN,
D. G. ROSE.

ARNOLD & LARNED and
SMITH & LISTON,
Solicitors for Def'ts.

State of Indiana, La Porte County, ss.

Personally appeared before me, the undersigned clerk of the La Porte Circuit Court (the same being a Court of Record), at my office in the city of La Porte, State of Indiana, Jonathan Crews, Lycurgus Sherman, and Mason G. Sherman, personally known to me as the defendants in the foregoing answer in chancery, by them severally subscribed in my presence, who, being by me severally and duly sworn, respectively say that they have heard the foregoing answer read over to them, and that they know the contents thereof, and that the same is true so far as the same is alleged and set forth to be of their own knowledge; and, as to the facts therein stated to be on information and belief, they and each of them verily believe them to be true.

JONATHAN CREWS,
LYCURGUS SHERMAN,
MASON G. SHERMAN.

In testimony whereof, I, James Moore, Clerk of the La Porte Circuit Court, have hereto set my name and affixed the seal of said court at the city of La Porte, this fourth day of December, A. D. 1857.

[SEAL.] JAMES MOORE, Clerk.

United States of America, Northern District of Illinois, ss.

Personally appeared before the undersigned, a commissioner of the United States of America within and for the Northern District of Illinois, David G. Rose, personally known to me as one of the defendants in the foregoing answer in chancery by him subscribed in my presence, who being by me sworn according to law, upon his oath says, that he has read the foregoing, and knows the contents thereof, and that the same is true so far as the same is alleged and set forth to be of his own knowledge, and as to the facts therein stated to be on information and belief, he verily believes the same to be true.

D. G. ROSE.

In testimony whereof I have hereunto set my hand and affixed my seal at the city of Chicago in the district aforesaid, this sixteenth

day of December, in the year of our Lord one thousand eight hundred and fifty-seven, and of our independence the eighty-second year.

[SEAL.] J. P. MOULTON,
U. S. Commissioner W. Dist. Illinois.

Endorsed: Filed Dec'b. 16th, 1857.
WM. H. BRADLEY, Clerk.

And afterwards, to wit, the 3d day of February, in the year of our Lord one thousand eight hundred and fifty-eight, the aforesaid complainants, by C. Beckwith, Esq., their solicitor, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their replication to the foregoing answers of the said defendants. Which said replication is in the words and figures following, to wit:—

United States of America, Northern District of Illinois, ss.

Circuit Court of the United States, Northern District of Illinois.

LYDIA TODD, HENRY C. BURCHAM et al.
vs.
JONATHAN CREWS, LYCURGUS SHERMAN, MARON G. SHERMAN and DAVID G. ROSE. } In Chancery.

The replication of Lydia Todd, Henry C. Burcham, et als., complainants, to the answer of Jonathan Crews, Lycurgus Sherman, Mason G. Sherman and David G. Rose, defendants.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto by these repliants.

Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

LYDIA TODD,
HENRY C. BURCHAM et als., Complainants,
By C. BECKWITH, their Solicitor.

Endorsed: Filed Feb'y 3d, 1858.
WM. H. BRADLEY, Clk.

And afterwards, to wit, the 24th day of May, in the year of our Lord one thousand eight hundred and fifty-eight, the aforesaid complainants by Messrs. Beckwith, Merrick, and Cassin, their solicitors,

came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their petition, which said petition is in the words and figures following, to wit:—

In the United States Circuit Court, in and for the Northern District of Illinois:

United States of America, Northern District of Illinois.

To the Honorable Thomas Drummond, Judge of the United States Circuit Court for the Northern District of Illinois:—

The petition of Henry L. Burcham, George W. Marshall, Francis M. Tompkins, William Stokes, Benjamin Schrugley, Frederick Swannell, Alexander Delori, Sarah Jane Bennett, Samuel A. Lane, Olive Robesham, James Taylor, William P. Symonds, John Baum, Jacob Dutcher, Thomas Powell, Edwin R. Rowley, Galen A. Marcy, and Lydia Todd, Abram Beedle, Jeremiah Peck, and William M. Thatcher, citizens of the State of Illinois, shows unto your honor, that they heretofore, on the fifteenth day of January, A. D. 1856, filed their bill of complaint in the above court on the chancery side thereof, against Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, citizens of the State of Indiana, and, in said bill of complaint, among other things, your petitioners prayed that an injunction might be granted restraining the defendants, or either of them, from further prosecuting certain suits at law then pending, and from commencing any further or other suits against your petitioners, or either of them, concerning or relating to the east fractional half of fractional section twenty-four in township Thirty-One, north of range thirteen east of the third principal meridian in the district of lands subject to sale at Chicago, Illinois, and from in any manner intermeddling with the possession of said premises and every part thereof, and of which will more fully appear by reference to the said bill of complaint now on file in said court, to which your petitioners would respectfully refer your honor.

And your petitioners further show unto your honor, that lately and since the filing of said bill of complaint, the said defendants entered upon said premises, and commenced to fence in the same and are still at work at the same, and are leaving to others portions of the same, and threaten to take entire possession of said premises, much to the harm and injury of your petitioners.

Your petitioners, therefore, pray, that the writ of injunction may issue, restraining the said defendants as prayed for in said bill of complaint, and more especially restraining them, or either of them, from in any way whatever interfering or intermeddling with the possession of said premises. WM. A. CHATFIELD.

Subscribed and sworn to before me, this 18th day of May, 1858.
WM. H. BRADLEY, Clerk.

Endorsed: Filed May 24th, 1858.
WM. H. BRADLEY, Clerk.

And afterwards, to wit, on the 7th day of July, in the year of our Lord one thousand eight hundred and fifty-eight, in the July term, A. D. 1858, the aforesaid complainants, by their solicitor, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their amendment to their said bill of complaints heretofore filed herein, which said amendment is in the words and figures following, to wit:—

United States Circuit Court, Northern District of Illinois.

LYDIA TODD, HENRY L. BURCHAM, et al.
vs.
JONATHAN CREWS et al.

Amend the bill of complaint by inserting after the following words: —"And your orators further show, that neither the said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose have any title to said premises, or claim to have any title thereto, or any part thereof, except such as they have derived under said Asnick as aforesaid."

The following words:—

And your orators are further informed and believe that the legal title to said premises has come to and is now vested in the said defendants by means of the death of said Francis Besion, and of the several conveyances hereinbefore mentioned, although the equitable title to the same is vested in your orators, as hereinbefore stated.

Endorsed: Filed July 7th, 1858.

WM. H. BRADLEY, Clerk.

The following stipulation appears filed among the papers in this cause:—

U. S. Circuit Court, Northern District of Illinois.

LYDIA TODD, HENRY L. BURCHAM, et al.
vs.
JONATHAN CREWS et al.

In the above entitled case it is admitted, that whatever title James Mix had, if any, to the east half of section 24, T. 31 N., R. 13 E., under an alleged contract with Francis Besion, given in evidence in this cause, has come to, and is vested in, the complainants in the manner set forth in the bill of complaint.

C. BECKWITH, Sol's for Compl'ts.
A. W. ARRINGTON, for Defendants.

July 7, 1858.

Endorsed: Filed July 7th, 1859.

WM. H. BRADLEY, Clerk.

And afterwards, to wit, the seventh day of July, in the year of our Lord one thousand eight hundred and fifty-eight, in the July

Term, A. D. 1858, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:—

HENRY L. BURCHAM, GEORGE W. MARSHALL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SCHRUGLEY, FREDERICK SWANNELL, ALEXANDER BELORI, SARAH JANE BENNETT, SAMUEL A. LANE, OLIVE ROBISHAM, JAMES TAYLOR, WILLIAM P. SYMONDS, JOHN BAUM, JACOB DUTCHER, THOMAS ROWELL, EDWIN R. ROWLEY, GALEN A. MARCY, and LYDIA TODD, ABRAM BEEDLE, JEREMIAH PECK, and WM. M. THATCHER,	In Chancery.
vs.	
JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE.	

Now the parties, by their respective solicitors, and by agreement, this cause is set down for hearing upon the bill, the answer thereto, the replication and exhibits on file, and the proofs, written and oral; and, after hearing a part of the testimony, the complainants dismiss their bill as to the complainants, Jacob Dutcher, Thomas Powell, and William M. Thatcher, and say they will no further prosecute the same as to the said complainants.

It is thereupon considered by the court that this bill be dismissed as to the said complainants.

And the said complainants by their solicitors now suggest the death of the complainant, John Baum, and file a copy of his will herein, and upon their motion, it is ordered by the court that William Baum, James Baum, John Baum, and Mary Baum, heirs at law of the said John Baum, deceased, be substituted upon the record as parties complainant hereto in the place of the said John Baum, deceased.

And on further motion of the said complainants by their solicitors leave is granted them by the court to amend their bill, which amendment is made forthwith. And after hearing the concluding testimony, and a part of the arguments of counsel, the hour of adjournment having arrived, the further arguments of counsel are postponed until to-morrow morning.

And afterwards, to wit, the eighth day of July, in the year of our Lord one thousand eight hundred and fifty-eight, in the July term, A. D. 1858, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:—

HENRY L. BURCHAM, GEORGE W. MARSHALL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SCHRUGLEY, FREDERICK SWANNELL, ALEXANDER DELORI, SARAH JANE BENNETT, SAMU'L A. LANE, OLIVE ROBISHAM, JAMES TAYLOR, WILLIAM P. SYMONDS, EDWIN R. RAWLEY, GALEN A. MARCY, ABRAM BEEDLE, JEREMIAH PECK, and LYDIA TODD, and WILLIAM BAUM, JAMES BAUM, JOHN BAUM, and MARY BAUM, heirs at law of JOHN BAUM, deceased,

vs.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE.

Now come again the parties by their respective counsel, and after hearing the further arguments of counsel until the hour of adjournment without concluding the same, the concluding arguments of counsel are postponed until to-morrow morning.

And afterwards, to wit, the ninth day of July, in the year of our Lord one thousand eight hundered and fifty-eight, in the July term, A. D. 1858, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:—

HENRY L. BURCHAM, GEORGE W. MARSHALL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SCHRUGLEY, FRANCIS SWANNEL, ALEXANDER DELORI, SARAH JANE BENNETT, SAMUEL A. LANE, OLIVE ROBISHAM et al.

vs.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE.

Now come again the parties by their respective counsel, and after hearing the concluding arguments of counsel the court, not being sufficiently advised in the premises, takes time to consider.

The deposition of William A. Chatfield, with the exhibits thereto attached, taken and read on behalf of the complainants and defendants, on the hearing of the above entitled cause, reads in the words and figures following, to wit:—

TODD and BURCHAM, et als.
vs.
CREWS.
} In Chancery.

It is agreed that a commission may be issued forthwith to take the testimony of Wm. A. Chatfield upon the interrogatories and cross-interrogatories filed, and that John W. Magill be appointed commissioner, and deposition may be taken in Chicago, neither party or their attorneys to be present at the taking.

Chicago, May 18, '58.

ARNOLD, LARNED & LAY.
BECKWITH, MERRICK & CASSIN.

Endorsed: Filed May 18th, 1858.

WM. H. BRADLEY, Clerk.

United States Circuit Court for the Northern District of Illinois.

LYDIA TODD, HENRY L. BURCHAM, FRANCIS M. TOMPKINS, et al.
vs.
JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE.
} In Chancery.

Interrogatories to be administered to William A. Chatfield, a witness to be produced, sworn, and examined in the above entitled cause, on the part of the complainants.

1st. What is your name, age, and place of residence, and how long have you lived in the place where you now reside?

2d. Where is the E ½ fr. sec. 24, T. 31, N. R. 13, located, and how long have you known said tract?

3d. State in whose possession said tract has been since you first knew it; name each occupant of said tract and each occupant of any part of said tract, from the time you first knew the same to the present time. What was the condition of said tract when you first knew the same? What improvements, if any, have since been put thereon, and by whom and when the same were made, and who is now in possession of said tract?

4th. State particularly who has paid the taxes upon said tract since you first knew the same; name each party who has paid said taxes or any part thereof, as far as you can recollect, and what taxes were paid by each of the parties named respectively, and when the same were paid.

5th. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this case? If yea, set forth the same fully and at large in your answers.

BECKWITH, MERRICK & CASSIN,
Solicitors for Comp't.

Endorsed: Filed June 9th, 1858.
WM. H. BRADLEY, Clerk.

United States Circuit Court, Northern District of Illinois.

LYDIA TODD, HENRY L. BURCHAM, FRANCIS M. TOMPKINS, et al., Compl'ts,
vs.
JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN and DAVID G. ROSE, Def'ts.
} In Chancery.

The defendants, taking all legal exception to the interrogatories as propounded to William A. Chatfield, propound the following cross-interrogatories:—

1. Are you a party defendant to this suit, or are you in any way interested in the event of this suit?

2d. Have you purchased or are you in occupation of any of the land in controversy in this suit, or did you ever have or own any of the land or any part thereof, and if so, when, and what did you do with the same?

3d. Did you ever sell any of the land in controversy and execute any warrantee deed or deeds to any person or persons, and if so, to whom, and when, and what part or portion, and the consideration therefor; or have you ever executed any lease or leases for any part thereof, or any bond for conveyance, and if so, to whom and when? State particularly.

4th. Are you a party defendant to any other suit or suits brought by defendants in this suit in this court for the possession of land where the same questions arise as are at issue as in this suit, and if so, what suit or suits, when brought, and if still pending?

5th. When, if ever, was Phillip Wather in possession of the land described in this suit, on the north side of the river, and how long did he continue in such possession?

6th. If in answer to direct interrogatories, you state that any person had possession of the land in controversy, on south side of river, state the name of such person, the way in which such person or persons took or had possession, from whom, the precise time or times such person or persons went into possession?

7th. Did not the said defendants take possession, and are they not now in possession of the land on the south side of the river, and when did they take possession of the same?

8th. State the names of all the parties, complainants in this bill, now living on said land on the north side of the river, and when they each came into possession of said land, and under whom each of them now claims possession of said land, or any part thereof.

9th. Do not all the persons now living on said land on the north side of the river, hold and claim possession under said defendants, and if not, who do not so claim or hold possession?

10th. State the names of those who do not hold or claim possession through defendants, and state by whom they were put in possession, when and by what authority, and whether you acted in any way in the matter, and if so, how, and in what capacity, and what writing or writings they, or each of them have, by whom given, how required, and who gave them such writings?

11th. Where are William Stokes, Benjamin Sheigley, and Sarah Jane Bennett now? Have they not removed from the county?

12th. Have not all the persons, complainants in this suit, living on the north side of the river, with the exception of Moses Taylor, Galen A. Marcey, Lydia Todd, and H. L. Burcham, taken bonds for conveyances, or quitclaim deeds, or leases from the defendants in this suit, or settled with the said defendants, and are they not now holding under them?

13th. Did the said defendants lease the land on the north side of

river in Nov., 1855, to any one, and if so, to whom have said defendants now leased the same?

14th. Is that part of the east half of section 24 on the south side of the river enclosed, and if so, by whom, and when, and how occupied now, and how used, and by whom, and from whom the parties in possession held or derive their possession?

15th. State whether any of the parties, named as complainants in this suit, have authorized application for an injunction to be made in this suit, and if yea, state particularly the name of each and every one of the complainants who authorized such application, and when, where, and in what manner they, or either of them, authorized such application.

16th. Have either of the following named persons, viz: George W. Marshall, Francis M. Tompkins, Wm. Stokes, Benjamin Sheigley, Frederick Swannell, Alexander Delori, Sarah Jane Bennett, Samuel A. Lane, Olive Robisham, James Taylor, Wm. P. Symonds, John Baum, Jacob Dutcher, Thos. Powell, Edwin R. Rowley, Abram Beedle, Jeremiah Peck, and Wm. M. Thatcher, authorized an application to be made for an injunction in this case, and if so, which of them, and when, and where, and in what way, and do you not know that the above named parties, or some of them, are not contesting the title of the defendants, but are occupying under them, and have taken leases or agreements for deeds from them?

17th. State whether the land on the south side of the river, in the section mentioned in interrogatories, was not vacant and unoccupied in 1853, and what, if any, improvements the complainants or their grantees, have ever made on the same, and when made, and if defendants took possession of any part thereof, say what part, and what, if any, improvements had been made by the complainants on such land, or any part thereof so taken possession of, and when such improvements were made, and by whom; state particularly.

18th. State by what conveyances, writing, or agreement, or otherwise, Moses Taylor and Galen A. Marcy held title or possession to said land, or any part thereof, and what part. State the date of such writing, by whom executed, and when, and where, and when delivered, and what, if any, authority had they for taking possession of any of said lands?

19th. Have not Sarah J. Bennett, George W. Marshall, Frederick Swannell, Benjamin Scheigley, Jacob Dutcher, and William Stokes taken title in some form, either by lease, deed, or bond, for deed from the defendants? Are either of them, and if so, which, contesting the defendants' title, or have they authorized an application for an injunction against said defendants?

20th. Were not the said defendants in possession of the land on north side of the river, in Nov., 1855, by their agent, Dr. John C. Lane?

21st. Are not the following named persons, or some of them, who are living on the land on the north side of the river in said section:

Geo. W. Rice, Richard Malone, M. O. Clark, James Kirby, W. Spragg, Frank Chippaway, John Spragg, Napoleon Taylor, Julien Pardir, Thomas Riley, Peter Ternel, John Hasley, and Ira J. Halstead, occupying and holding possession under these defendants have mostly taken leases of the said defendants, and does not this comprise all the parties in possession of said land, except Moses Taylor and Galen A. Marcy?

22. Are not William H. Patterson and one Webster in possession of $198\frac{95}{100}$ acres on the south side of river under lease from these defendants, and have they not been for some time in possession thereof; and have they not inclosed the same, and put the same into cultivation, and have they not been in possession thereof since Nov. 10, 1855, and if not, from what time have they been so in possession?

23d. By whom were you requested to make the affidavit formerly filed by you, to obtain an injunction in the suit? State particularly the name of each and every party complainant who requested you to make such affidavit or application, and when and where.

ARNOLD, LARNED & LAY,
S'l'rs for Def'ts.

Endorsed: Filed June 18th, 1858.
WM. H. BRADLEY, Clerk.

United States of America, Northern District of Illinois, ss.

The United States of America to John W. Magill, Esq., as Commissioner in Chicago, Cook County, and State of Illinois, greeting:—

We, reposing special confidence in your fidelity and provident circumspection, do hereby authorize and appoint you to take testimony in writing of William A. Chatfield, whom you are hereby authorized and required to bring before you at such time and place as you may designate and appoint for that purpose, and that at such time and place you will proceed to examine under oath said witness upon the interrogatories and cross-interrogatories hereunto annexed, at the instance of the compl'ts and def'ts, in a certain cause now pending and undetermined in our Circuit Court of the United States for the Northern District of Illinois, before the judges thereof, whereof Lydia Todd, Henry L. Burcham, George W. Marshall, Francis M. Tompkins, William Stokes, Benjamin Schrugly et al., are plaintiffs, and Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, are the defendants; the annexed interrogatories and cross-interrogatories, and the answers thereto, you will cause to be reduced to writing in the order in which they shall be proposed and answered, and shall then be signed by said witness; at the foot thereof you will add a certificate subscribed by yourself, stating that it was sworn to and subscribed by said witness, and the time and place when and where the same were taken; which said examination of said witness so taken, with your certificate thereto attached, you will send directed to any clerk of our Circuit Court of the United States for the Northern District of Illinois, sealed, with the names

of the parties litigant endorsed thereon, with early convenient dispatch; together with this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at Chicago, Illinois, this 18th day of June, in the year of our Lord one thousand eight hundred and fifty-eight, and of our independence the 82d year.

[SEAL.] WM. H. BRADLEY, Clerk.

United States, Northern District of Illinois, ss.

Be it remembered, that on the nineteenth day of June, Anno Domini one thousand eight hundred and fifty-eight, personally appeared William A. Chatfield, before me, John W. Magill, a commissioner appointed by the Circuit Court of the United States in and for the Northern District of Illinois, in the Seventh Circuit, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., to testify and the truth to say, on the part and behalf of the plaintiffs, in a certain suit or matter of controversy now depending and undetermined in the Circuit Court of the United States for the Northern District of Illinois, wherein Lydia Todd, Henry L. Burcham, Francis M. Tompkins, et al., are complainants, and Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, are defendants, on the chancery side of said court.

And the said witness, being of lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon depose, testify, and say as follows, viz:—

Interrogatory first. What is your name, age, and place of residence, and how long have you lived in the place where you now reside?

Answer to first interrogatory. My name is William A. Chatfield. I am fifty-nine years of age. I reside at the town of Momence in the county of Kankakee, in the State of Illinois. I moved there in the spring of the year eighteen hundred and forty-four.

Interrogatory second. Where is the east half (E. $\frac{1}{2}$) fr. section twenty-four (24) town thirty-one (31) north range (N. R.) thirteen (13) located, and how long have you known said tract?

Answer to second interrogatory. It is located in Kankakee County, in the State of Illinois. It is in the eastern portion of Kankakee County, and lies on both sides of the Kankakee River. I have known said tract since the spring of the year eighteen hundred and forty-four.

Interrogatory third. State in whose possession said tract has been since you first knew it. Name each occupant of any part of said tract from the time you first knew the same to the present time. What was the condition of said tract when you first knew the same? What improvements, if any, have been put thereon, and by whom, and when the same were made, and who is now in possession of said tract?

Answer to third interrogatory. When I first knew the tract, which

was in the spring of eighteen hundred and forty-four, the possession of it was claimed by Philip Worcester, and I went on it as the tenant of Todd and Mix, and by consent of said Philip Worcester; it has been in the possession of Todd and Mix since the spring of the year eighteen hundred and forty-five, or eighteen hundred and forty-six, I am not sure which; Philip Worcester gave up possession of it about that time, as I understood, and it has remained in possession of Todd and Mix ever since; they have paid taxes on it ever since, and no person has claimed title to it until the commencement of this suit; I cannot name all the occupants of said tract, for a great many have occupied the north part of it, which has been laid out in a town, but I will not name those I do remember; when I first knew the same, Philip Worcester occupied the north part of said tract as a farm; I don't think that at that time the other portion of the tract was occupied by any person; I think in June of the year eighteen hundred and forty-nine, the north part of said tract was laid out in a town by James Mix; previous to its being laid out in a town, as well the north part of said tract as the whole of said described tract, came into the possession and occupancy of Todd and Mix, and was made, when laid out, a part of the town of Momence, and lay immediately north of the Kankakee River; afterwards it was sold by lots to various persons by Mix, and by myself, as the agent of Mr. Mix, and a Mr. Stunck, who is now *who is now* deceased, as the agent of Mix, sold several of the lots; F. M. Tompkins purchased and occupied the south twenty-five feet of lot one, in block forty-three; this was in November of the year eighteen hundred and fifty; George Marshall purchased sixty feet of the same lot on the said block, on the north side of said block, it was purchased by him in the month of April of the year eighteen hundred and fifty-one; William G. Swannell purchased twenty-five feet of the same lot in eighteen hundred and fifty-one; William Stokes purchased thirty (30) feet of the same lot in eighteen hundred and fifty-two; Henry L. Burcham purchased a portion of the same lot in eighteen hundred and fifty-three; Benjamin Shrugley purchased the whole of lot four, in the year eighteen hundred and fifty-three; M. F. Tompkins also purchased all of lot three in November of the year eighteen hundred and fifty; Serel Taylor purchased all of lot two, in block forty-four, in April, eighteen hundred and fifty-one; Alexander De Lore purchased in April, of the year eighteen hundred and fifty-one, all of lot three, in block forty-four; Napoleon Taylor purchased at the same time, all of lot six in the same block; Samuel A. Lane in April, eighteen hundred and fifty-four, purchased all of lot one, in block fifty-seven; P. Robisham in eighteen hundred and fifty-two, purchased lot three, in block fifty-seven; a deed was afterwards made of this lot to Olive Robersho, the contract for the sale of the same having been assigned to him; J. C. Lane in April, eighteen hundred and fifty-four, purchased lot four, in block fifty-seven; the contract for the sale of this lot was assigned by Lane to E. C. Bragton, and a deed

has been made to him, which is now in my hands for delivery; John J. White purchased lot five, in block fifty-seven, and he assigned his contract to Francis Taylor, and a deed was made to said Taylor, in the month of February of the year eighteen hundred and fifty-two; Alexander De Lore, in August, eighteen hundred and fifty-two, purchased lot eight, in block fifty-seven, and he assigned to William P. Simons, and a deed was made to said Simons; Charles Forsie, in eighteen hundred and fifty-one, purchased lot eight, in block fifty-eight; he assigned his contract to John Baum, since deceased, and a deed of the same was made to said Baum, in eighteen hundred and fifty-two; there have been some leases given to parties of lots in said block fifty-eight, but I cannot now remember the names of the parties leasing; Richard Hall, in eighteen hundred and fifty-one, purchased forty feet of the east end of block fifty-nine; he gave up his contract, and it was afterwards sold to A. O. Woodworth, in August, eighteen hundred and fifty-two; John C. McElvane purchased in eighteen hundred and fifty-two, part of the same block; Oscar F. Gear, in eighteen hundred and fifty-two, purchased part of block sixty, and the agreement was afterwards cancelled by mutual consent, in the year eighteen hundred and fifty-four; William G. Swannell, in November, eighteen hundred and fifty-two, purchased lots five and eight, in block sixty-one; he afterwards assigned his contract to Louis Bertrand; John Gibbons, in November, eighteen hundred and fifty-two, purchased lots six and seven, in block sixty-one; E. R. Rowley, in July, eighteen hundred and fifty-two, purchased lot eight, in block seventy-seven, and a deed was made to him in April, eighteen hundred and fifty-three; Frederick Swannell, in July, eighteen hundred and fifty-two, purchased block seventy-eight; A. O. Woodworth, in February, eighteen hundred and fifty-two, purchased blocks seventy-nine and eighty; G. A. Marcy, in November, eighteen hundred and fifty, purchased the whole block ninety-eight.

The particulars I have above given, are given partly from memory, and I have refreshed my recollection by a reference to memoranda made at the time of the above-mentioned sales, as to dates, &c.; many of the parties I have above named, are no longer occupants, some having died, others moved away. The balance of the tract was kept in a common and was occupied, and ownership exercised over it by said Todd and Mix.

The condition of said tract when first I knew it, was on the north side of the river used as a farm; that part of the tract on the south side of the river was open prairie.

When I first knew it, the only improvements thereon were two or three log cabins, and none others were made thereon until after the sale of the lots I have before stated. I cannot state the exact time when such improvements were made, but nearly all the purchasers whose names I have given did erect buildings on the lots purchased by them. Todd and Mix are now in possession of all the tract save

the portion sold by them in the town of Momence, so far as the payments of taxes is concerned.

Interrogatory fourth. State particularly who has paid the taxes upon said tract since you first knew the same; name each party who has paid said taxes, or any part thereof, as far as you can recollect, and what taxes were paid by each of the parties named respectively, and when the same were paid.

Answer to fourth interrogatory. The taxes have always been paid by Todd and Mix ever since I knew it, and the taxes on the lots sold as I have stated have been paid by the purchasers of said lots; all the taxes levied were paid by those parties. This is as particular as I can answer the question.

Interrogatory fifth. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this case? If yea, set forth the same fully and at large in your answer.

I do not remember anything more, save that in block ninety-nine several lots were sold, and improvements made thereon by the purchasers. Other lots were sold and leased by Mix and Todd, and other agents than myself, the particulars of which I cannot give, for I do not remember. I offer the plat marked Exhibit "A" to be annexed to this my deposition, and in explanation of parts thereof. The red line on the same will enclose and show the south part of said tract as platted and laid out as a part of the town of Momence by Todd and Mix. The balance of said tract lies immediately opposite, on the south side of the river. WM. A. CHATFIELD.

Sworn and subscribed to this 19th day of June, A. D. 1858.

JNO. W. MAGILL,
U. S. Commiss'r Nor. Dist. of Illinois.

Cross-examined.

Cross-interrogatory first. Are you a party defendant to this suit, or are you in any way interested in the event of this suit?

Answer to first cross-interrogatory. I am not a party defendant to this suit, nor am I in any way interested in the event of the same.

Cross-interrogatory second. Have you purchased or are you in occupation of any of the land in controversy in this suit, or did you ever have or own any of the land, or any part thereof, and if so, when, and what did you with the same?

Answer to cross-interrogatory second. I have not purchased nor am I in occupation of any of the land in controversy in this suit. I did occupy a portion of the lands in controversy on the north side of the river. I never had or owned any of said tract, nor any part thereof. I moved on to the part I have stated in the spring of 1844, and moved off said land in the fall of 1847.

Cross-interrogatory third. Did you ever sell any of the land in

controversy, and execute any warranty deed or deeds to any person or persons, and if so, to whom and when, and what part or portion, and the consideration therefor, or have you ever executed any lease or leases for any part thereof, or any bond for conveyance, and if so, to whom and when? State particularly.

Answer to cross-interrogatory third. I have sold some of the land in controversy, but not in my own name; I sold them, and executed papers in the name of Todd and Mix, and under a power of attorney; I never executed any warranty deed or deeds to any person of any part of said tract; but I have executed bonds and leases. I cannot now remember the parts or portions sold, nor the persons to whom I sold, and to whom I executed papers, bonds, or leases; I generally made the bargains, and Mix consummated them; it was very seldom that I executed them.

Cross-interrogatory fourth. Are you a party defendant to any other suit or suits brought by defendants in this suit, in this court, for the possession of land, where the same questions arise or are at issue, as in this suit; and, if so, what suit or suits, when brought, and if still pending.

Answer to cross-interrogatory fourth. I am, I suppose; I don't know what the questions may be, but I am a party to two other suits. They are similar suits to this, I suppose, and are brought regarding land in sections eighteen and nineteen, in township Thirty-one, range fourteen; they were brought about the same time, and I believe are still pending.

Cross-interrogatory fifth. When, if ever, was Phillip Waster in possession of the land described in this suit on the north side of the river, and how long did he continue in such possession?

Answer to cross-interrogatory fifth. He was in possession of it in eighteen hundred and forty-four; I think he left it in the spring of 1846.

Cross-interrogatory sixth. If, in answer to direct interrogatories, you state that any person had possession of the land in controversy on the south side of the river, state the name of such person, the way in which such person or persons took or had possession, from whom, the precise time or times such person or persons went into possession.

Answer to cross-interrogatory sixth. There was no one had possession of the land after Phil Worcester left, save Todd and Mix; their names are Hiram Todd and James Mix. It was a float claim; so I have always understood; they purchased it, and went and took possession of it; occupied and paid the taxes thereon; they went into possession of it in the spring of 1844.

Cross-interrogatory seventh. Did not the said defendants take possession, and are they not now in possession of the land on the south side of the river, and when did they take possession of the same?

Answer to cross-interrogatory seventh. The defendants, I think, took possession in the year 1856; fencing in and planting the land

by B. McIntyre. Patterson and Webster are now in possession as I am informed; I don't know whether the defendants in this suit are now in possession of the land or not; Patterson and Webster took possession some time in 1857, and have been in possession ever since, so far as I know.

Cross-interrogatory eighth. State the names of all the parties, complainants in this bill, now living on said land on the north side of the river, and when they each came into possession of said land, and under whom each of them now claims possession of said land or any part thereof.

Answer to cross-interrogatory eighth. I cannot state the names of all the parties, complainants in this bill, now living on said land on the north side of the river, for some of them are gone away, and I don't know whether they are alive or not; some are dead, and I could not now recollect the names of all the parties. I cannot state when they each came into possession further than I have already answered in my direct examination; they claim under Todd and Mix, I suppose.

Cross-interrogatory ninth. Do not all the persons now living on said land on the north side of the river, hold and claim possession under said defendants? and, if not, who do not so claim or hold possession?

Answer to cross-interrogatory ninth. I do not know that any of them do; Todd and Mix and G. A. Marcy and all the complainants in this suit, I suppose they do not claim or hold possession through the defendants.

Cross-interrogatory tenth. State the names of those who do not hold or claim possession through defendants, and state by whom they were put in possession, when and by what authority, and whether you acted in any way in the matter, and, if so, how, and in what capacity, and what writing or writings they or each of them have, by whom given, how signed, and who gave them such writing.

Answer to cross-interrogatory tenth. I cannot state the names of those who do not hold or claim possession through defendants; I don't know the names of any who claim possession through the defendants, but I know that there are some squatters on the land; I do not know how they were put in possession, nor by what authority, except as to those who bought of Todd and Mix; they were put into possession by Todd and Mix; I acted as the agent of Todd and Mix in the premises; they had leases, bonds for deeds, and deeds given to them; the papers or writings were given them by Todd & Mix, or by me for them. Some of them were signed by me as their agent or attorney, but generally by them. I signed Mix's name by my own.

Cross-interrogatory eleventh. Where are William Stokes, Benjamin Shrigley, and Sarah Jane Bennett now? Have they not removed from the county?

Answer to cross-interrogatory eleventh. I understand William

Stokes lives at Urbana, Illinois; Benjamin Shrigley lives in the State of Minnesota; and Sarah Jane Bennett lives in Iroquois County, she that was Sarah Jane. They have removed from the county.

Cross-interrogatory twelfth. Have not all the persons complainants in this suit, living on the north side of the river, with the exception of Moses Taylor, Galen A. Marcy, Lydia Todd, and H. L. Burcham, taken bonds for conveyances, or quit-claim deeds, or leases from the defendants in this suit, or settled with the said defendants? and are they not now holding under them?

Answer to cross-interrogatory twelfth. I don't know that any of them have done so; but I have been told that some of them have.

Cross-interrogatory thirteenth. Did the said defendants lease the land on the north side of the river in November, 1855, to any one? If so, to whom have said defendants now leased the same?

Answer to cross-interrogatory thirteenth. I do not know that they have leased it at all.

Cross-interrogatory fourteenth. Is that part of the east half of section Twenty-Four on the south side of the river enclosed? and, if so, by whom, and when, and how occupied now, and how used, and by whom and from whom the parties in possession hold or derive their possession?

Answer to cross-interrogatory fourteenth. Well, sir, I believe it is mostly enclosed and in crops. It was enclosed by McIntyre in 1856, a part of it, and more of it by Patterson and Webster. It is occupied now as a farm, used as a farm by Patterson and Webster. I am told they have a lease from the defendants.

Cross-interrogatory fifteenth. State whether any of the parties named as complainants in this suit have authorized an application for an injunction to be made in this suit; and, if yea, state particularly the name of each and every one of the complainants who authorized such application, and when, where, and in what manner they or either of them authorized such application.

Answer to cross-interrogatory fifteenth. They have. Lydia Todd and G. A. Marcy did, during the course of this summer; they authorized such application by complaint against Crews and others for fencing up the streets and alleys. These complaints came from most all of the citizens living on the ground, and they as well as Todd and Marcy, who requested me to have the same prevented. I came to the city of Chicago, took advice of counsel respecting the matter, found they could be stopped by injunction; and I applied for one as agent for the owners, as they requested. I cannot now call to mind the persons who called and authorized such an application, as they came occasionally and complained before I moved in the matter at all. I remember Ira J. Haested; he is another who spoke about it.

Cross-interrogatory sixteenth. Have either of the following named persons, viz: Geo. W. Marshall, Francis M. Tompkins, W. Stokes, Benjamin Shreigley, Frederick Swannell, Alexander Delori, Sarah

Jane Bennett, Samuel A. Lane, Olive Robersham, James Taylor, Wm. P. Symonds, John Baum, Jacob Dutcher, Thomas Russell, Edwin R. Rowley, Adam Beedle, Jeremiah Peck, and Wm. M. Thatcher, authorized an application to be made for an injunction in this case, and if so, which of them, and when and where, and in what way; and do you not know that the above named parties or some of them are not contesting the title of the defendants, but are occupying under them, and have taken leases or agreements of deeds from them?

Answer to cross-interrogatory sixteenth. Tompkins, Stokes, Shrigley, Lane, Swannell, Delori, Sarah Jane Bennett, Taylor, Symonds, Dutcher, Beedle, Peck, are not now living in the town of Momence, and the most of them are out of the State of Illinois. Baum is dead, and I am his executor; Rowley is dead, and I am his administrator; Thatcher and Robersham are dead; neither of these persons have authorized such application. I acted for the heirs of the estate I represented. I do not know that those parties or any of them are not contesting the title of the defendants. I do not know that they are occupying under them, or whether they have taken leases or agreements for deeds from them.

Cross-interrogatory seventeenth. State whether the land on the south side of the river, in the section mentioned in interrogatories, was not vacant and unoccupied in 1853, and what, if any, improvements the complainants or their grantees have ever made on the same, and when made, and if defendants *and if defendants* took possession of any part thereof, say what part, and what, if any, improvements had been made by the complainants on such land or any part thereof so taken possession of, and when such improvements were made, and by whom; state particularly.

Answer to cross-interrogatory seventeenth. I think it was vacant and unoccupied in 1853, excepting the part which I think was in that year subdivided into blocks, and made a part of the south addition to the town of Momence. There have been no improvements made by the complainants or their grantees on the same, that I know of. McIntyre fenced and broke some of the land; he had fenced a large portion of the tract on the south side of the river, and Patterson and Webster have completed the fencing of, I believe. I don't know of any improvements that the complainants had made on the land so taken possession of, save the laying it out into blocks; this was, I think, in 1853, and it was made by James Mix.

Cross-interrogatory eighteenth. State by what conveyance, writing, or agreement, or otherwise, Moses Taylor and Galen A. Marcy hold title or possession to said land or any part thereof, and what part. State the *the* date of such writing, by whom executed, and when and where delivered, and what, if any, authority had they for taking possession of any of said land.

Answer to cross-interrogatory eighteenth. No such man as Moses Taylor purchased, the Messrs. Taylors, who purchased, held title

and possession to lot two, in block forty-four, and lot six, in block forty-four, by warranty deed; the date of such deeds was April, of the year 1851; the deeds was executed by James Mix, I think; it was delivered, I suppose, about the time of its execution; I know of no other authority that they had for taking possession of said land; Galen A. Marcy held title by bond, from James Mix, to block ninety-eight, dated 16th Nov., 1850; this bond was afterwards taken up and a new one given him in April, 1854, the time of the payments being extended, delivered about the times they bear date; I presume that was his authority for taking possession.

The further taking testimony in this cause is adjourned by me to Monday next, the twenty-first instant, at my office, to be commenced at the hour of nine, A. M. of said day, dated Chicago, June 19th, A. D. 1858.

JNO. W. MAGILL,
U. S. Com'r for Nor. Dist. of Illinois.

Monday, June 21st, 1858, nine A. M., witness presents himself, and examination continued.

Cross-interrogatory nineteenth. Have not Sarah S. Bennett, George W. Marshall, Frederick Swannell, Benjamin Shrigley, Jacob Dutcher, and William Stokes taken title in some form, either by lease, deed, or bond, for deed from the defendants; are either of them, and if so, which, contesting the defendants' title, and have they authorized an application for an injunction against said defendants?

Answer to cross-interrogatory nineteenth. I don't know whether they have or not; I have no knowledge concerning their prosecutions; I don't know but all of them are contesting defendants' title; I did not talk with any of them on the subject of the injunction; they have not authorized an application for an injunction against said defendants, to my knowledge.

Cross-interrogatory twentieth. Were not the said defendants in possession of the land on north side of the river, in November, 1855, by their agent, Dr. John C. Lane?

Answer to cross-interrogatory twentieth. I did not know that Dr. John C. Lane ever acted as their agent.

Cross-interrogatory twenty-first. Are not the following named persons, or some of them, who are living on the land on the north side of the river in said section, viz: Geo. W. Rice, Richard Malone, M. D. Clark, James Kirby, W. Spragg, Frank Chepponway, John Spragg, Napoleon Taylor, Julien Parvis, Thomas Riley, Peter Pernal, John Halsey, and Ira J. Halstead, occupying and holding possession under these defendants, and have not they taken leases of the said defendants, and does this not comprise all the parties in possession of said land, except Moses Taylor and Galen A. Marcy?

Answer to cross-interrogatory twenty-first. I do not know that any of them are occupying and holding possession under the defendants; they may have taken leases of the defendants; I do not know

whether they have or not; the parties mentioned in the interrogatory do not comprise all the parties in possession of said land.

Cross-interrogatory twenty-second. Are not William H. Patterson, and one Webster, in possession of 198 $\frac{95}{100}$ acres, on south side of the river, under lease from these defendants, and have they not been for some time in possession thereof, and have they not enclosed the same and put the same into cultivation, and have they not been in possession thereof since November 10th, 1855, and if not, from what time have they been so in possession?

Answer to cross-interrogatory twenty-second. They are in possession of the land on the south side of the river; they took possession, I think, when McIntyre left, and are in possession of it now; I don't know whether they are under lease or not; they have enclosed or finished enclosing it, and have it under cultivation; I can't state date when they took possession; I think they took possession when McIntyre went out, and that was this last spring.

Cross-interrogatory twenty-third. By whom were you requested to make the affidavit formerly filed by you to obtain an injunction in the suit? State particularly the name of each and every party complainant who requested you to make such affidavit or application, and when and where.

Answer to cross-interrogatory twenty-third. I was requested in this manner by a number of persons, as well those who lived on the land as by those who did not, to take some action and remove the impediments from the street which Crews had fenced up; the names of all those parties I cannot recollect, but I know that Todd, Mix, Marcy and Holstead did authorize me to make the application, and I was informed by counsel that it would be necessary to make an affidavit, which I did, and on the authority I have above stated, on their complaints and by their requests to have the nuisance abated, and the streets and alleys opened. I felt authorized to make such an affidavit, and have their approval of my course in the manner.

WM. A. CHATFIELD.

Subscribed and sworn to this twenty-first day of June, A. D. 1858.

JNO. W. MAGILL,
U. S. Com. for Nor. Dist. of Illinois.

United States, Northern District of Illinois, ss.

I, John W. Magill, a commissioner appointed by the Circuit of the United States in and for the Northern District of Illinois, in the Seventh Circuit, under and by virtue of the acts of Congress, do hereby certify that by virtue of a Dedimus Potestatum, or commission issued out of the clerk's office of the circuit of the United States for the Northern District of Illinois, bearing teste in the name of the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, with the seal of said court affixed thereto, and to me directed as such commissioner for the examina-

tion of the said William A. Chatfield, a witness in a certain suit and matter in controversy, now pending and undetermined in the said Circuit Court for the Northern District aforesaid, wherein Lydia Todd, Henry L. Burcham, Francis M. Tompkins et al. are complainants, and Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, are defendants, in behalf of the said complainants, as well upon the cross-interrogatories of the said defendants as on the interrogatories of the complainants, which were attached to the said commission, and upon none others. I further certify that on the nineteenth day of June, one thousand eight hundred and fifty-eight, I was attended by said William A. Chatfield, the witness, who was of sound mind and lawful age, and he having been by me carefully examined and cautioned, and sworn to testify the whole truth, his deposition was thereupon commenced to be taken, and afterwards adjourned to the twenty-first day of June, at the same place the was concluded, and I have retained the said deposition in my possession for the purpose of transmitting the same to the court for which it was taken. I further certify that I am not of counsel or attorney for either of the parties in the said deposition and caption named, or in any way interested in the event of the said cause, and that at the taking of said witness' deposition neither party nor any attorney or attorneys for either of the parties, complainants or defendants, were present. I further certify that the paper attached to this deposition, and marked exhibit "A," is the same testified to by said witness in his said examination.

In testimony whereof I have hereunto subscribed my name, this 21st day of June, A. D. 1858.

JOHN W. MAGILL,
United States Commissioner
for the Northern District of Illinois.

Opened for Mr. Beckwith July 7th, 1858.

WM. H. BRADLEY, Clk.

(Here follows plat referred to as exhibit A, in Chatfield's deposition. See original, page 163.)

Momence.

Drawn on a scale of 4 chains to the inch.

I do hereby certify that the above is a true map of the town of Momence as surveyed by me June the 10th, 1849.

N. B. For further particulars see surveyor's record.

JEDDIAH WOOLLEY, Jr.,
County Surveyor of Will Co.

Explanation.

The original map of which this is a copy, is drawn on a scale of 4 chains to the inch, but being too large for the record book, the scale

has been reduced. This map is drawn on scale of 300 feet to one inch.

R. C. DUNCAN, Rec'd.

State of Illinois, Will County, ss.

I, Jesse O. Norton, probate justice in and for said county, hereby certify that this map was duly acknowledged before me by James Mix, the proprietor, this day.

Witness my hand and seal this 30th day of June, A. D. 1849.

JESSE O. NORTON, Probate Justice.

Filed for record, August 15, 1849.

R. C. DUNCAN, Rec'd.

State of Illinois, County of Will, ss.

I, Alexander McIntosh, Clerk of the Circuit Court, and ex-officio Recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office on the fifteenth day of August, A. D. 1849, and recorded in book No. 9 of records, on page 640, the same being plat of the town of Momence.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court at Joliet this fourteenth day of June, A. D. 1858. [SEAL.] A. McINTOSH.

After the hearing of this cause the following stipulation was filed by the solicitors of the respective parties herein, and reads in the words and figures following, to wit:—

LYDIA TODD, HENRY L. BURCHAM et al.
vs.
JONATHAN CREWS et al.

U. S. Cir. Court, N. Dist. of Ill.

On the hearing of the above cause, the following papers were read in evidence:—

1. Patent from the United States to Francis Besion, dated February 17, 1845, of the E. f'r ½ of f'r sec. 24 on both sides of the Kankakee River, the f'r of the said east f'r ½ on the north side containing $70\frac{88}{100}$ of an acre, the f'r of the said E. f'r ½ on the south side containing $198\frac{95}{100}$ acres in T. 31, N. R. 13, E. of the 3d P. M.

2. Contract Francis Bezayon with Wm. Armstrong, dated Feb. 4, 1833.

3. Assignment William Armstrong to Thomas T. Benbridge, dated Sept. 2, 1836.

4. Assignment Thomas T. Benbridge to James Mix, dated Aug. 13, 1842.

5. Plat of Momence, acknowledged Aug. 9, 1853.

A. W. ARRINGTON,
Counsel for Defendants.
C. BECKWITH,
For Compl'ts.

The patent from the United States of America to Francis Besion, dated February 17, 1845, of the E. fr. ½ of fr. sec. 24, on both sides of the Kankakee River, the fr. of the said east fr. ½ on the north side, containing 70⁸⁰of an acre, the fr. of the said E. fr. ½ on the south side, containing 198⁹⁵ acres in T. 31 N. R. 13 E. of the 3d P. M. reads in the words and figures following, to wit:—

The United States of America, to all to whom these presents shall come, greeting:—

Whereas, by the third article of the treaty made and concluded on the Tippecanoe River, in the State of Indiana, on the twenty-seventh day of October, one thousand eight hundred and thirty-two, between Jonathan Jennings, John W. Davis, and Marks Crume, Commissioners on the part of the United States, and the chiefs and warriors of the Potawatomies, of the State of Indiana and Michigan Territory, the United States agreed to grant by patent to Francis Besion one-half section, to be selected under the direction of the President of the United States, after the lands were surveyed, and the boundaries to correspond with the public surveys.

Now know ye, that the President of the United States having approved of the selection of the east fractional half of fractional section twenty-four, on both sides of the Kankakee River, the fraction of the said east fractional half on the north side, containing seventy acres and eighty-eight hundredths of an acre, the fraction of the said east fractional half on the south side, containing one hundred and ninety-eight acres and ninety-five hundredths of an acre, in township thirty-one, north of range thirteen, east of the third meridian in the district of lands subject to sale at Chicago, Illinois, to which the said Francis Besion is entitled under the said treaty:

There is, therefore, granted by the United States, unto the said Francis Besion and to his heirs, the tract of land above described, to have and to hold the said tract, with the appurtenances, unto the said Francis Besion, and to his heirs and assigns forever.

In testimony whereof I, John Tyler, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. [SEAL.]

Given under my hand, at the city of Washington, this seventeenth day of February, in the year of our Lord one thousand eight hundred and forty-five, and of the Independence of the United States the sixty-ninth.

By the President,

J. TYLER. [SEAL.]
By J. TYLER, Jr., Sec'y.
A. M. WHITNEY,
Recorder of the General Land Office.

Recorded vol. 1, page 82 of patents, under Potawatomie Treaties of 1832. Ex'd.

The contract of Francis Bezayon with William Armstrong, dated Feb. 4th, 1833, reads in the words and figures following, to wit:—

Whereas, in and by a treaty holden and concluded by and between Jonathan Jennings, John W. Davis, and Marks Crume, Commissioners, on the part of the United States of the one part, and the head chiefs and warriors of the Potawatomie nation of Indians, of the other part, it was concluded and agreed, amongst other things, that there was, and should be reserved and secured to Francis Bezayon one-half section of land, to contain three hundred and twenty acres, to be located under the direction of the President of the United States, after said lands conveyed by said treaty, have been surveyed, which said treaty has been ratified by the Senate of the United States, and the said Francis Bezayon, for his support and maintenance, being desirous of selling and disposing of his right, title and interest in said half section of land aforesaid, reserved to him by the treaty aforesaid, confirmed and ratified by the Senate aforesaid, to William Armstrong, of Knox County, and State of Indiana, for and in consideration of the sum hereafter mentioned, paid to said Bezayon, and the receipt whereof is hereby acknowledged, makes the following indenture, to wit:—

This Indenture, made this 4th day of February, 1833, between Francis Bezayon and William Armstrong, of the county of Knox, and State of Indiana, witnesseth, That the said Francis Bezayon, for and in consideration of the sum of four hundred dollars, lawful money of the United States, to him in hand paid by the said William Armstrong, the receipt whereof is hereby acknowledged, and for and in consideration of the further sum of one hundred dollars, to be paid by the said William Armstrong, on the completion of a full and perfect title to said Armstrong, of said half section so reserved to said Bezayon, and for which said last mentioned sum of one hundred dollars, the said Armstrong has this day executed his note, bearing even date herewith, to said Bezayon, the said Francis Bezayon hath and by these presents doth give, grant, bargain, sell, alien, release, convey, and confirm unto the said William Armstrong, his heirs and assigns, the aforesaid half section of land reserved to him, the said Bezayon, by the treaty aforesaid, and I do hereby authorize and empower the said William, his heirs and assigns, to locate said land, after the said land is surveyed agreeably to the provisions of said treaty, and the laws of the United States, and obtain a patent therefor, in his own name; and I do hereby further authorize and request the President of the United States to consent to the transfer and assignment of my interest in said half section of land reserved to me as aforesaid, and to the issuing of a patent for the same to said Armstrong, his heirs and assigns.

To have and to hold unto the said William Armstrong, his heirs and assigns, the aforesaid half section of land with its appurtenances forever, hereby conveying unto the said Armstrong, his heirs and assigns, all the right and interest belonging to or in anywise appertaining unto me in said half section of land with its appurtenances. And I, the said Francis Bezayon, do for myself, my heirs, executors

and administrators, covenant and agree to and with the said William Armstrong, his heirs and assigns, that I will warrant and forever defend the said half section of land reserved to me as aforesaid by the treaty aforesaid, from all claims and demands whatever, either of myself or those claiming under me, as against the claims of all other persons, and that I will, at any and all times hereafter, at the proper costs and charges of said Armstrong, his heirs or assigns, make and execute any and all other further deed or deeds of conveyance and transfer necessary in law, to assure and confirm unto him, said Armstrong, his heirs or assigns, a title to the aforesaid half section of land, with its rights and privileges.

In witness whereof I have hereunto set my hand and affixed my seal at Vincennes, Knox County, Ind., this 4th February, 1833.

his
FRANCIS × BEZAYON. [SEAL.]
mark

Witnesses.—JNO. LAW.
JOHN PURCELL.

State of Indiana, Knox County, sct.

Be it remembered, that on this the fourth day of February, eighteen hundred and thirty-three, before me, the undersigned, a justice of the peace, duly commissioned and qualified, for the county of Knox and State of Indiana, personally came the above-named Francis Bezayon (the said Francis being well known to me as the claimant of said land reserved at the Pottowatomie treaty, and conveyed to William Armstrong), who acknowledged the foregoing indenture to be his act and deed freely and voluntarily, for the purposes above mentioned, and desired the same might be recorded as such.

In testimony whereof I have hereunto set my hand and affixed my seal, this 4th February, 1833.

JNO. COLLINS, J. P. [SEAL.]

Recorded in my office at Vincennes, Knox County, Indiana, February 20th, 1833, in Book F, pages 154 and 155.

HENRY RUBLE, Recorder Knox County.

State of Indiana, Knox County, ss.

I, Alexander D. Scott, Clerk of the Knox Circuit Court, do certify that Henry Ruble, whose name is to the above, was at the time of signing the same and still is, acting recorder in and for the county of Knox and State of Indiana, duly commissioned and qualified, and that full faith and credence is due and ought to be given to his official acts as such, and I believe the foregoing signature purporting to be his is genuine.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, this 18th day of Sept., A. D. 1834.

[SEAL.] A. D. SCOTT, Clerk.

The assignment from William Armstrong to Thomas F. Benbridge, dated Sept. 2d, 1836, reads in the words and figures following, to wit:—

Know all men by these presents, that William Armstrong and Mary, his wife, for and in consideration of the sum of eight hundred dollars, lawful money, to us in hand paid, the receipt whereof is hereby acknowledged, have, and by these presents do give, grant, convey, transfer, assign, and set over to Thomas T. Benbridge, his heirs and assigns forever, all and singular our right, title, interest, claim and demand, of what nature soever, of, in, and to the land mentioned in the deed hereunto attached, all *all* the rights and claims of what nature soever conveyed and granted to the said William Armstrong by said deed in manner mentioned therein.

In testimony whereof we have hereunto set our hands and seals, this 2d day of September, 1836.

WILLIAM ARMSTRONG. [SEAL.]
MARY ARMSTRONG. [SEAL.]

In presence of JNO. COLLINS, as to Mary Armstrong.

State of Indiana, Tippecanoe County, sct.

Be it remembered, that on this 2d day of September, A. D. 1836, at my office, in said county, personally came before me the undersigned, a justice of the peace within and for said county, the above-named William Armstrong (the said William Armstrong being known to me as the identical person named and intended in the deed hereunto attached), and acknowledged that he signed, sealed, and delivered the above assignment and transfer as his voluntary act and deed for the purposes therein set forth.

In witness whereof I have hereunto set my hand and seal the 2d day of September, 1836.

[SEAL.] H. B. SLAUGHTER, J. P.

State of Indiana, Knox County, sct.

Before me, the undersigned, a justice of the peace within and for said county, at my office in said county, this 24th day of September, A. D. 183 , personally came the above named
above-named William Armstrong, and being by me examined, separate and apart from her said husband, touching the above assignment and transfer of the hereunto annexed deed, and the contents thereof being made known to her, declared and acknowledged that she voluntarily and of her own free will and accord, without any coercion or compulsion on the part of her said husband, signed, sealed, and delivered the said assignment and transfer as her act and deed for the purposes therein set forth, and that she thereby relinquished all right and claim to dower in the lands in said deed mentioned.

Given under my hand and seal, this 24th day of September, A. D. 1836. JNO. COLLINS, J. P. [SEAL.]

State of Indiana, Knox County, sct.

I, Alexander D. Scott, clerk of the Circuit Court of said county, do hereby certify, that John Collins, Esq., whose signature and seal are attached to the certificate last hereinbefore contained, is, and at the time of making said certificate, a justice of the peace within and for said county, duly commissioned, qualified, and acting as such, and that the said signature and seal are the genuine signature and seal of said justice.

Witness my hand and the official seal of said court hereto annexed, at my office, in said county, this 24th day of September,

[SEAL.] 1836. A. D. SCOTT, Cl'k.

By H. N. McCORD, D. C.

On the back of the paper containing the foregoing contract of assignments, deed, and certificates are within the following certificates of the recorders of the counties of Iroquios and Will.

State of Illinois, County of Iroquois, sct.

I, Hugh Newell, recorder in and for said county, do hereby certify that the foregoing transfer, together with the several certificates thereto annexed, are duly recorded in my office.

Witness my hand this 1st day of March, 1836.

H. NEWELL, Recorder.

State of Illinois, Will County, ss.

I do certify the within deed to have been filed for record this 20th day of August, A. D. 1842, and recorded in Book G of deeds, pages 418, '19, and '20. GEO. H. WOODRUFF, Recorder.

By SMITH.

The assignment from Thomas T. Benbridge to James Mix, dated Aug. 13th, 1842, reads in the words and figures following, to wit:—

Know all men by these presents, that Thomas T. Benbridge and Ann, his wife, for and in consideration of the sum of one thousand nine hundred dollars, lawful money, to us in hand paid, the receipt whereof is hereby acknowledged, and by these presents do give, grant, convey, transfer, assign, and set over to James Mix, his heirs and assigns, forever, all and singular our right, title, interest, claim, and demand, of what nature soever, of, in, and to the land mentioned in the deed hereunto attached, all the right and claim, of what nature soever conveyed and granted to the said Thomas T. Benbridge and Ann, his wife, by the foregoing deed and assignment, in manner mentioned in said deed and assignment.

In testimony whereof, we have hereunto set our hands and seals this 13th day of August, 1842.

THOMAS T. BENBRIDGE. [SEAL.]
ANN BENBRIDGE. [SEAL.]

Sealed, signed, and delivered in presence of
DAVID RUNNION,
JASPER BRADLEY.

State of Indiana, Tippecanoe County, ss.

Before me, David Runnion, a justice of the peace of said county, personally came Thomas T. Benbridge and Ann Benbridge, his wife, the grantors named in the above conveyance, by assignment, and acknowledged that they signed and sealed the same for the purposes therein specified; and the said Ann Benbridge, the wife of the said Thomas T. Benbridge, having been by me examined separate and apart from her said husband, as by law required, touching the said assignment, and the full contents having been by me made known to her, declared that she signed and sealed the same of her own voluntary free will and accord, without any coercion or compulsion of her said husband, and that she thereby relinquished all her right and claim to dower in the said premises.

In witness whereof, I have hereunto set my hand and seal this 15th day of August, 1842. DAVID RUNNION, [SEAL],
Justice of the Peace.

State of Indiana, Tippecanoe County, ss.

I, Mark Jones, Clerk of the Tippecanoe Circuit Court in the State of Indiana, do hereby certify that Allan B. Slaughter, Esquire, whose signature appears to the certificate at the time of the transfer from William Armstrong and wife to Thomas T. Benbridge, September 2d, 1836, was at that date an acting justice of the peace within and for said county, duly elected, commissioned, and qualified, according to law, and, as such, all his acts are entitled to full faith and credit; and also that David Runnion, Esquire, before whom the within deed appears to have been acknowledged, and whose signature appears to the certificate thereto, was, at the date thereof, an acting justice of the peace within and for said county, duly elected, commissioned, and qualified, according to law, and, as such, all his acts are entitled to full faith and credit.

In testimony whereof, I have hereto set my hand and affixed the seal of said court at office in Lafayette, this 15th day of August, A. D. 1842.

[SEAL.] MARK JONES, Clerk.
Per JASPER BRADLEY.

(Here follows plat. See original, page 192.)

I hereby certify the above map is a true representation of the subdivision of the south fraction of the N. E. ¼ and the southeast ¼ of section 24, township 31 N., of range 13 E., of the third P. M., and the south fraction of the N. W. ¼ of section 19, township thirty-one, N. of range 14 E., of the third P. M. on the south E. side of the Kankakee River, as surveyed by me, for James Mix.

June 25th, 1853. JEDDIAH WOOLLY, JR.,
County Surveyor of Will County, and Deputy
United States Surveyor for Illinois.

Scale 200 feet to one inch.

State of Illinois, County of Cook, ss.

Before me, the undersigned, Circuit Judge of the Seventh Judicial Circuit of Illinois, personally appeared James Mix, to me personally known to be the same person who caused the addition, whereof the above is a map, to be laid out, and who is the proprietor of the same, and acknowledged the said map to be true and correct.

Given under my hand and seal, this 9th day of August, 1853.

B. S. MORRIS,
Judge of the Seventh Circuit Court of Illinois.

State of Illinois, Kankakee County, ss.

I, Philip Worcester, clerk of the Circuit Court, and ex-officio recorder within and for the county of Kankakee and State of Illinois, do hereby certify that the foregoing is a full, true, and correct copy of a certain plat of the south addition to the town of Momence, in said county and State aforesaid, as recorded in Book No. one, page No. 85, Kankakee County Records.

In attestation whereof I have hereunto set my hand and affixed the seal of said court, at the office of said clerk, in Kankakee city, county and State aforesaid, this twenty-sixth day of June, A. D. 1858.

[SEAL.] PHILIP WORCESTER, Clerk.

The following stipulation appears filed among the papers in this cause:—

LYDIA TODD, HENRY L. BURCHAM, et al.
vs.
JONATHAN CREWS, et al.

Whereas, the court in the above entitled cause has intimated its opinion in favor of the compl'ts, and, whereas, in drawing up the final decree in said cause, it is desirable that so much of said decree as requires releases, should be executed by said def'ts, should be so drawn as to require but one release from the def'ts of the whole premises, which will have the effect to make the title thereby released enure to the complainants according to their respective rights:

It is, therefore, stipulated that so much of said decree as requires releases from said def'ts shall be so drawn, as to require a release of the whole of said premises to James Mix, to and for the use and benefit of said complainants, according to their respective rights and interests in said premises; and although said def'ts protest against the justice of said decree against the def'ts, and reserve all their rights in that respect, but said def'ts consent that the decree may be drawn in the above manner, instead of being drawn as prayed for by the bill.

Nov. 30, 1859.

C. BECKWITH, Sol'r for Compl'ts.
A. W. ARMIGTON, for the Defendants.

Endorsed: Filed Dec. 1st, 1859. WM. H. BRADLEY, Clerk.

And this day, to wit, the first day of December, in the year of our Lord one thousand eight hundred and fifty-nine, in the October adjourned term, A. D. 1859, the following proceedings were had in said court, in said entitled cause, and entered of record, to wit:—

HENRY L. BURCHAM, GEORGE W. MARSHALL, FRANCIS M. TOMPKINS, WILLIAM STOKES, BENJAMIN SCHRUGLEY, FREDERICK SWANNELL, ALEXANDER DELORI, SARAH JANE BENNETT, SAMUEL A. LANE, OLIVE ROBISHAM, JAMES TAYLOR, WILLIAM P. SYMONDS, JOHN BAUM, JACOB DUCHER, THOMAS POWELL, EDWIN R. ROWLEY, GALEN A. MARCY, LYDIA TODD, ABRAM BEEDLE, JEREMIAH PECK, and WILLIAM M. THATCHER,

vs.

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN, and DAVID G. ROSE. } In Chancery.

This cause having been heretofore heard by the court, and argued by counsel, and having been taken under advisement by the court, now at this time, the court being fully advised therein, upon consideration thereof, it is ordered, adjudged, and decreed that the said defendants, and each of them, and their and each of their attorneys, agents, and servants, be perpetually enjoined from further prosecuting the suit at law, in favor of the said defendants, and against the oratrix, Lydia Todd, which was commenced for the recovery of the east half of section twenty-four, township thirty-one north of range thirteen, east of the third principal meridian, and other premises, and is now depending on the law side of this court, so far as the said suit at law relates to or seeks the recovery of the said east half of section twenty-four, township thirty-one north of range thirteen aforesaid, or any part thereof, and be also perpetually enjoined from commencing or prosecuting any other suit at law against the orators or either of them, for the recovery of the possession of said last-mentioned premises, or any part thereof.

And it is further ordered, adjudged, and decreed that said defendants and each of them, and their and each of their agents, servants, and all persons holding under the said defendants, or either of them, since the filing of the bill of complaint in this cause, to wit, January fifteenth, eighteen hundred and fifty-six, do forthwith surrender and yield up to the said complainants the quiet and peaceable possession of so much and such parts of said premises as are now in the possession of the said defendants, or either of them, or any of the persons aforesaid.

And it is further ordered, adjudged, and decreed that said defendants, and each of them, do within ten days from this date execute and deliver unto James Mix, for the use of the complainants, a good and sufficient deed of release under their hands and seals acknow-

ledged, in conformity with laws of the State of Illinois therein, and thereby conveying and confirming and releasing unto the said James Mix, his heirs and assigns, all the right, title, and interest of the said defendants and each of them, and which they had at the commencement of this suit, in and to the east half of section twenty-four, township thirty-one north of range thirteen, east of the third principal meridian, to and for the use of the said complainants, according to their respective rights and interests in the premises; said deed to be deposited with the clerk of this court, for the use of the said complainants within the time aforesaid.

And it is further ordered, adjudged and decreed that the said complainants have and recover their costs by them in and about this suit expended, to be taxed by the clerk of this court, and that they have execution therefor, and the defendants pray an appeal to the Supreme Court, which is granted upon their filing a bond conditioned according to law, in the penalty of four thousand dollars, with Crew Sherman and Alson S. Sherman, as security, and therefore the defendants file their appeal bond in conformity with this order and leave, which is approved by the court.

And afterwards to wit, the first day of December, in the year of our Lord one thousand eight hundred and fifty-nine, in the October adjourned term, A. D. 1859, came the plaintiffs in error, by their said solicitor, and filed in the office of the clerk of the Circuit Court of the United States, for the Northern District of Illinois, their bond, which said bond is in the words and figures following, to wit:—

Know all men by these presents, that we, Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, Oren Sherman, and Alson G. Sherman, are held and firmly bound unto Henry L. Burcham, George W. Marshall, Francis M. Tompkins, William Stokes, Benjamin Schrigley, Frederick Swannell, Alexander Delori, Sarah Jane Bennett, Samuel H. Lane, Olive Robisham, James Taylor, William P. Symonds, John Baum, Jacob Dutcher, Thomas Powell, Edwin R. Rowley, Galen A. Marcy, and Lydia Todd, Abram Beedle, Jeremiah Peck, and William M. Thatcher, in the sum of four thousand dollars, to be paid to the above named obligees, their executors or administrators.

To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and one and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this first day of December, in the year one thousand eight hundred and fifty-nine.

Whereas, the above named obligors, Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, have appealed to the Supreme Court of the United States, from a decree in chancery, made and entered on the first day of December, in the year one thousand eight hundred and fifty-nine, in a cause in which the said above named obligees are complainants, and the said Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose,

are defendants, which said decree was made and entered by the Circuit Court of the United States for the Northern District of Illinois.

Now therefore, the condition of the above obligation is such, that if the above named Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their said appeal, and shall pay all damages and costs that may be awarded against them as such appellants therein, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JONATHAN CREWS, [SEAL.]
LYCURGUS SHERMAN, [SEAL.]
MASON G. SHERMAN, [SEAL.]
OREN SHERMAN, [SEAL.]
ALSON S. SHERMAN, [SEAL.]

Signed, sealed and delivered in presence of
F. B. PEABODY,
A. W. ARMINGTON.

Approved, THOMAS DRUMMOND.

Endorsed: Filed Decb. 1st, 1859.
WM. H. BRADLEY, Clerk.

Northern District of Illinois, ss.

I, William H. Bradley, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record, wherein Henry L. Burcham and others were complainants, and Jonathan Crews and others defendants, as the same appears of record on the files of said court, and now remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Chicago, this 23d day of December, eighteen hundred and fifty-nine, and of the Independence of the United States the eighty-fourth year.

[SEAL.] WM. H. BRADLEY, Clerk.

United States of America, Northern District of Illinois, ss.

William W. Parish, Algernon S. Vail, and Charles S. Wiltse, being severally duly sworn each for himself, deposes and says, that he is well acquainted with the land in controversy in a certain suit in chancery, wherein a decree was entered in the Circuit Court of the United States, for the Northern District of Illinois, on the first day of December, A. D. 1859, from which decree the defendants in said suit have appealed to the Supreme Court of the United States, in which suit Henry L. Burcham, George W. Marshall, Francis M. Tompkins, William Stokes, Benjamin Schrigley, Frederick Swannell,

Alexander Delori, Sarah Jane Bennett, Samuel A. Lane, Olive Robisham, James Taylor, William P. Symonds, John Baum, Jacob Dutcher, Thomas Powell, Edwin R. Rowley, Galan A. Marcy, and Lydia Todd, Abram Beedle, Jeremiah Peck, and William M. Thatcher, were complainants, and Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, were defendants.

And these affiants, each for himself, deposes and says, that said land is of a greater value than the sum of two thousand dollars, and is in fact worth the sum of eight thousand dollars and upwards.

WM. W. PARISH,
ALGERNON S. VAIL,
CHARLES S. WILTSE.

Sworn to and subscribed before me this first day of December, A. D. 1859.

WM. H. BRADLEY, Cl'k
Of Circuit Court U. S., N. District of Ill.

Endorsed: Filed Dec. 1st, 1859.

WM. H. BRADLEY, Cl'k.

Northern District of Illinois, to wit:—

I, William H. Bradley, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify that the above and foregoing is a true copy of the affidavit of the value of the land in controversy, filed in open court, in the presence of the counsel of the complainants, hereinafter named, on the first day of December, eighteen hundred and fifty-nine, in the Circuit Court of the United States for the Northern District of Illinois, on the chancery side thereof, wherein Henry L. Burcham, George W. Marshall, Francis M. Tompkins, William Stokes, Benjamin Schrigley, Frederick Swannell, Alexander Delori, Sarah Jane Bennett, Samuel N. Lane, Olive Robisham, James Taylor, William P. Symonds, John Baum, Jacob Dutcher, Thomas Powell, Edwin R. Rowley, Galen A. Marcy, and Lydia Todd, Abram Beedle, Jeremiah Peck, and William M. Thatcher, were complainants, and Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and Jonathan Crews, Lycurgus Sherman, Mason G. Sherman, and David G. Rose, were defendants, said suit being then and there depending, as the same appears from the original thereof now remaining on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in the city of Chicago, this twelfth day of January, eighteen hundred and sixty, and of the Independence of the United States the eighty-fourth year.

[SEAL.] WM. H. BRADLEY, Clerk.

Filed 3d January, 1860.

609

609

Supreme Court of the United States.

NO. 88.

JONATHAN CREWS et al.

vs.

HENRY L. BURCHAM et al.

ARGUMENT FOR APPELLANTS,

BY

A. W. ARRINGTON, Esq.

Supreme Court of the United States.

NO. 88.

JONATHAN CREWS et al.

vs.

HENRY L. BURCHAM et al.

ARGUMENT FOR APPELLANTS,

BY

A. W. ARRINGTON, Esq.

By treaty, on the 27th of Oct., 1832, the Potowatamies of the State of Indiana and Michigan Territory ceded to the United States their title to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River. The second article of this treaty makes certain reservations from the cession. And the third article reads thus:—"The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." A list of names and quantities ensues, and among others, the specification appears:—"For Francis Besion, one half section."

The third article closes with the sentence:—"The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys."

7 Statutes at Large, pages 399, 400.

The President, by patent, on the 17th of Feb., 1845, granted to Francis Besion and his heirs the land now in controversy. The appellants claim by deed from the heirs of Francis Besion, and their legal title is fully admitted in the bill of the appellees. See printed record, p. 31.

On the 4th of Feb., 1833, one Francis Bezayon made a deed to William Armstrong, purporting to convey the half section of land promised by the treaty, but without describing any particular tract. Record, p. 51. And the appellees claim under Armstrong.

It is averred in the bill of the appellees, and conceded by the answer of the appellants, that the half section was selected by the President for Francis Besion, on the 29th of March, 1837. Record, pages 4 and 14.

Francis Besion died in the year 1843, and before the emanation of the patent. Record, pages 9 and 21.

These are the cardinal facts from which a judicial determination of this case must be evolved; and having premised them thus briefly, I now invoke a patient hearing for my argument.

First. It is submitted, that no interest, as to the land in controversy, vested in Francis Besion by mere operation of the treaty.

But this proposition implies two others:—

A. No legal interest in the land vested;

B. No equitable interest vested.

These will be treated in their order.

A. No legal interest, in this land, vested in Francis Besion, by mere operation of the treaty.

This proposition rests on several independent premises, all of which are deemed logically coercive.

I. The treaty contains no words of present grant. On the contrary, all its effective terms have exclusive reference to the future.

It declares, "the reservations *shall be* selected under the direction of the President of the United States." But when? The treaty answers, "after the lands *shall have been* surveyed, and the boundaries to correspond with the public surveys."

Does it not seem impossible to confound the distinctions of tense in this phraseology? The reservations are not yet existent at the date of the treaty, but are to become, and that only after a contingent future event—"after the lands shall have been surveyed." Here, all the limitations of time are contra-distinguished by indelible marks. How, then, can it be pretended that what the treaty says shall be accomplished, *in futuro*, was actually accomplished at the very instant when the treaty itself was made? I am aware that imagination sometimes employs the license of very animated speech to represent both past and future as transferred into the present. This, however, never occurs in the solemn prose of a statute or treaty. And assuredly, no figure of rhetoric, no flight of poetic daring ever yet ventured to picture the present as a fact of the future.

The treaty says, moreover, that "the lands shall be conveyed by patent." Let me pause to analyze the separate *momenta* of this form of expression. "The lands shall be conveyed." Therefore, they were not then conveyed, *eodem tempore*, with the utterance of the treaty. "The lands shall be conveyed;" and to the question, *quo modo*? the answer given by the treaty is, "by patent." The land, the *res ipsa*, was to be conveyed, that is to say, "transmitted from one to another," by patent. But if by patent, then to a certainty, the land was not to be conveyed by any other species of transfer; and therefore, not by the treaty *per se*. *Expressio unius est exclusio alterius*. Broom's Max. p. 505.

It is conceded that, in sentences involving a high degree of generality, much caution is requisite in the application of the maxim just cited.

But in cases of specific assertion such as the present, it is but the simple enunciation of a logical formula, or a concise statement of a process of necessary thought. For example, it is clearly impossible to think of a single act of conveyance of the same person or thing as being both by land and by water. Because the two modes are

reciprocally exclusive. No more can one piece of property, real or personal, in the same act of transfer, be passed from one to another both by treaty and by patent. Hence, if this land was conveyed by treaty, from the Government to Francis Besion, nothing remained in the Government to be conveyed by patent. But the treaty itself says, "the land shall be conveyed by patent." Therefore, it could not be conveyed by treaty. It can scarcely be supposed that the United States intended to violate the old precept of Cicero—*actum ne agas*,—a precept, in its literal sense, perfectly futile, because the fact prohibited is impossible.

The construction of the treaty for which I contend has been sanctioned by an eminent judge of a State court, and upon the same principle of reasoning as that employed in the present argument. Longlois *v.* Coffin, 1 Carter's Indiana Rep. p. 446.

II. No interest in this land could pass by the treaty, because this land, as an individual thing had, then, no place in the category of real being. It had no "local habitation or name," or mark of identity to distinguish it from the great unmeasured mass of the newly acquired Federal domain. It existed only *in posse*, as a statue in the marble of mountains—a pure creation of the mind. But certainly, it needs no logic to show that what does not actually exist cannot be the subject of a conveyance, although it may be of an executory agreement.

III. No legal interest passed, because no definite land was described in the treaty. In the language of a well considered case, "if no lands are described, nothing can pass." Jackson *v.* Woodruff, 1 Cow. p. 286; Livingston *v.* Peru Iron Co., 9 Wend. p. 520. Or, to use the words of Chief Justice Marshall, "It is undoubtedly essential to the validity of a grant, that there should be *a thing* granted, which must be so described as to be capable of being distinguished from other things of the same kind." Blake *v.* Doherty, 5 Wheat. p. 362. And to the same effect is the case of United States *v.* King, 3 How. p. 786—787.

The principle announced in these cases, in its application to the present, may be exhibited in a demonstrative form by this plain di-

lemma. If any interest became vested in Francis Besion by pure force of the treaty, it must have been either an interest in some particular part of the public domain, or in all the public domain. But it could not be an interest in any definite part of the public domain; because no definite part was individuated in the treaty: and it could not be an interest in all the public domain; because the grant was to be, in terms as well as intention, of only one half section. Therefore, no interest vested by mere force of the treaty.

IV. No interest would have passed, even had the treaty employed terms of present grant. Because the individual land granted would still have remained to be determined by subsequent election.

I entreat especial attention, at this point of the argument, while I state, and attempt to solve, the general legal problem which must emerge in all such cases as this.

Suppose A has twenty horses, and sells or grants one of them to B, what then is the legal result effected?

Now to this question, only three possible answers can be given:

1. The property in one definite horse passes, and B becomes owner of that;

2. An undivided interest in all the twenty horses passes, and B becomes tenant in common with A in all; or,

3. No property of any sort passes, but B gains a bare right of election to choose one horse out of the twenty; and when the choice shall have been made, but not until then, the property in the horse chosen passes by virtue of the election.

I now proceed to show that the first two solutions are wholly untenable.

In the first place, the property in one definite horse can not pass; because no definite horse is individuated in the grant; and hence, it is clearly impossible to imagine any reason why one should pass rather than another.

Secondly, if the property in all the twenty horses passes, and B becomes, *ipso facto*, a tenant in common with A in all the twenty, then B has an equal right with A to the possession of all. But this is as manifestly contrary to the intention of the parties as to the terms of the grant. The grant is not of an *aliquot* share to the extent of one-twentieth part in value in the collective totality of the twenty horses, but of one horse, as an indeterminate individual, out of the twenty. And it is a plain contradiction in formal thought to predicate, that the grant of one horse can confer on the grantee a right to the possession of twenty.

Therefore, from all that has been said, the third supposition above stated affords the only rational solution of the problem enunciated.

And therefore, *a multi fortiori*, the grant of one half section undescribed out of an indefinite and immense mass of public lands, can pass no interest whatsoever, until election has individuated the thing granted.

It may, perhaps, be objected, that in cases where the power of election belongs to the grantor, the grantee takes a chose in action —the right to demand the due exercise of such power of election by the grantor.

The answer to this is two-fold and decisive. First, the hypothesis has no foundation in legal principle. On the contrary, if the party having the power to elect makes default, the only consequence is, that the right of election devolves on the other party. Com. Dig. Election, A. 2.

Secondly, if a case of election on the part of the grantor did imply the personal right of a chose in action on the part of the grantee, such chose in action would not be legally assignable; nor could it attach *ad rem* to any land; nor run against heirs or assignees. And certainly, no one will pretend that it could be enforced against the Government.

Thus stands the doctrine of election as a logical result of pure reason *in abstracto*. But the doctrine does not rest in theory alone. Since the day when it was first elaborated into judgment in the

Law French of Chief Justice Dyer, it has been cited by the great text-writers and, and reasserted by the highest courts.

BULLOCKS CASE, 10 Eliz., Dyer, p. 281, is the earliest instance I have been able to discover on the subject of election. The same is stated *in extenso*, 2 Co. Rep. p. 36.

The case was this. The Bishop of Sarum having a great wood of 1000 acres, enfeoffed another of a house and 17 acres of the wood, and made livery of the house.

It was held:— "that none of the wood passed *before election of* the *feoffee*, as to what part he would take." And also, "that this election must be exercised during the life of the feoffee; and that, therefore, his heir could not make such election."

It may, however, be asked, Why could not the heir exercise the power of election? For the invincible reason, that "no interest passed until election;" and hence, no interest of any nature descended to the heir.

To the same effect is the *fourth resolution* in HEYWARD'S CASE, 2 Co. Rep. p. 36:—"Where the things are several, *nothing passes before election*, and the election ought to be *precedent*. Therefore, if I have three horses, and I give you one of my horses, in this case the election ought to be made in the life of the parties; for inasmuch as none of the horses is given in certain, the *certainty, and thereby the property, begins by election*."

The same resolution is transferred by Lord Coke into his Commentaries upon Littleton. Co. Litt. 145, a.

STUKELY *v.* BUTLER, Hobart's Rep. p. 174, lays down the rule thus—"Where election creates the interest, nothing passes till election. The vendee has no property till his election."

But it seems needless to adduce any more ancient authorities, since all the English cases declare, *unica voce*, the same doctrine. See Bacon's Abridg. Grant, H. 3; Sheppard's Touchstone, p. 251.

The American cases have also followed the rule. JACKSON *v.* VAN BUREN, 13 Johns. p. 525, is directly on the point. There, one hun-

dred acres of land, in a certain larger patent, were devised to M., "where she pleased to take the same, and to her heirs and assigns, forever."

It was held, "that no title to any particular part of the patent vested in M., and that she not having made any election in her lifetime, the right of election was gone, and could not be exercised by her heirs."

This doctrine was adjudged, too, in Vandenburgh *v.* Van Bergen, 13 John. p. 217; Haven *v.* Cram, 1 New Hamp. p. 93; Canning *v.* Pinkham, *Id.* p. 356.

At this stage of the argument, I beg permission to repeat what I have already presented, though in a different form. In reducing the doctrine of the cases previously cited to their ultimate analysis as the result of a process of reasoning, two considerations are apparent.

1. The principle of election is not a deduction from mere technical premises, but emanates as a necessary corollary from the laws of pure thinking. If I grant one of two things,—say, acres of land,—without designating which, it is impossible that the property should pass in both, or either, but by a contradiction of the terms of the grant. Let us call the supposed two acres respectively A and B. Let it then be assumed that the property in both passes. That is contradictory to the plain terms of the grant. Because the grant is not of both A and B, but of one only, and that one indeterminate as betwixt the two.

Again. Suppose A alone to pass, or B alone to pass. That equally contradicts the words and meaning of the grant. Because it annuls the alternative betwixt A and B. The grant is, in form, indeterminate betwixt A and B. But if one passes, the other cannot pass. And hence, the grant, on the hypothesis, would become determinate. But a grant, in relation to the same subject, cannot be both determinate and indeterminate. Therefore, it is absurd to affirm that either A or B can pass by such a grant *per se*, or without the occurrence of some ulterior fact.

2. The reason why the heir, in such cases, can not exercise the election is obvious. Because nothing passes until election. Therefore, if the election be not made before the death of the grantee, there is never any interest in the ancestor to be transmitted to the heir.

Hence, too, results the general corollary: that if the heir could exercise the power of election, since no interest descends unto him he would take as a purchaser, and not as an heir.

But the principle in discussion, in its application to the case before the court is far more cogent than in many of the examples quoted from the books. For here, the treaty contains no promise of any grant to heirs or assignees. The promise is to Francis Besion, and to him only.

However, let us now turn to the parallel case. Suppose the privilege of election to be, by express words, in the grantor. Such a case is evidently much stronger than that already considered, against even the possibility of any thing passing before election. Demonstrably so. Because the grant declares in terms, that the grantor shall, *out of a plurality*, select the *individual thing* which the grantee is to have as his own. Therefore, *ex necessitate*, the selection must be made before that thing can vest in the grantee. Must not the cause be anterior to the effect? Must not the condition precede its result? The consequent can not be posited even in thought, until the antecedent has called it into being.

But this difference, and this only, must be remarked between the cases of election by the grantor and by the grantee. The grantor can, by election, vest the property in the heir of the contingent grantee, as, after the death of such grantee before election, he can in any other person. The reason of this difference is manifest. Because the property remains in the power of the grantor, to be disposed of at his pleasure. But it is clear in such case, since nothing has descended to the heir, he must take as a purchaser, and, therefore, free from all claims against his ancestor. Or, to speak more correctly, *qua* this new acquisition of property, there is no ancestor.

And now, having reached this point, I have to encounter the most serious difficulty to be met with in my argument. I mean the case of MANN AND HANNAH *v.* WILSON, 23 How. p. 457.

It is not to be disputed, that the judgment in the case just mentioned was direct and positive to the effect: "that the individual grantees under this treaty took by way of reservation, and therefore, became, *ipso facto*, tenants in common with the United States; and thus had an existing legal interest in the land susceptible of sale and assignment." Nevertheless, I am constrained by a consciousness of duty, and with the utmost respect, to attempt the delicate task of invoking a consideration, *de novo*, of the doctrine thus announced; feeling, at the same time, the most undoubted assurance that if such doctrine shall be demonstrated to be utterly without support, whether on the basis of principle or authority, then this august tribunal will not hesitate, even an instant, to correct the mistake.

I shall now proceed to offer what I have to say on this part of the subject under two general heads:

I. That the judgment in the case of Mann and Hannah *v.* Wilson can not be sustained in the view of either principle or precedent.

II. That that case is not, in its essential circumstances, an analogue of the present.

I hasten to discuss these divisions in their order.

I. That the individual grantees under the treaty could not be, in any known sense of the term, tenants in common with the Government, may be proved by several independent lines of argument.

1. Such a construction would annul that essential part of the treaty which says, "the lands shall be conveyed by patent." Because, if the lands were conveyed by treaty, they could not, *inter eosdem partes*, be conveyed by patent, any more than a triangle can be made a square. But this point has been already sufficiently discussed.

2. That construction repudiates the principle of election so thoroughly grounded, as we have seen, both in reasons *a priori*, and the decisions of positive law.

3. The individual grantees under the treaty could not take any interest by way of reservation.

The certainty of this proposition is apparent from several considerations.

In the first place, reservations, by Indian treaties, have been uniformly regarded as exceptions out of the territory ceded, and therefore, mere continuations of the old Indian title. Mann and Hannah *v.* Wilson, 20 How. p. 463. Hence, reservations are not the grants of any new title or interest. They but preserve the *status quo ante pactionem.*

But in this case, the interest contemplated as being about to be conferred upon the particular Indians named in the third article of the treaty, was, by express terms, to take effect *in futuro.*

But such a relation to future time is absolutely in contradiction to the nature of a reservation, which operates only *in præsenti*, and that not to produce, but only to prevent, an effect that would otherwise happen, namely, the cession of the definite part so reserved.

In the second place, if the interest of the particular Indians mentioned in the treaty had been vested immediately by way of reservation, such interest, as has been shown, would be merely the former Indian title of occupancy.

But this latter title always existed, before the treaty, in the Indian tribe, while the ultimate fee was always in the Government. Yet the thought never entered into the mind of a court to infer, from the fact of the concurrence of these two species of title as to the same land, that the Indian tribes and the United States were tenants in common. Can a reason, then, be imagined why the treaty which, as to the reservations, does not extinguish or change the Indian title, should have the strange efficacy to convert the Indian reservees into common tenants with the Government in the public domain? The supposition is contrary to one of the fundamental axioms in the Inductive Logic,—"that no new effect, in a given state of circumstances, can be produced, without the intervention of a change in the antecedents."

In the third place, the Indian right of occupancy has no sort of analogy or similitude to any kind of tenure known in American law. The occupancy of the Indians, even in regard to one another, is no

more than the original natural right of the savage state, the right of hunting and fishing, and of a temporary use, for ever lost the instant it is abandoned, and then ready to be acquired by the first new comer. Jackson *v.* Porter, Paine's Rep. p. 457; Fletcher *v.* Peck, 6 Cranch, p. 142; Johnson *v.* M'Intosh, 8 Wheat. p. 543.

The individual Indians never were tenants in common, in the legal sense of the term, even *inter se*. No single Indian had any definite or *aliquot* share in value in any lands of the tribe, much less in the whole territory. No one was entitled to partition, or accountable for the reception of profits. Each one had the savage right of the first occupant, limited in space by a mere *pedis positio*, and in time, by duration of residence. His title, in respect to any particular locality, was scarcely higher than that of the beaver to the hut in which it passes its winter.

Is it not, then, utterly inconceivable that such a vagrant right as this should coalesce with a title in fee so as to result in a tenancy in common, as between the holders of estates as heterogeneous as fire and water? Can it be possible to affirm such a relation, unless indeed we might suppose the Government itself to turn hunter and fisher, as well as temporary occupant, with a possession flitting from prairie to forest, at every change of the seasons? What kind of a tenancy in common is that which blends the natural right of occupancy into legal unity with the technical titles of our Anglo-American law? The two species of right have not a single point in common by which they might be conjoined; and their union could only generate a legal birth as fantastic as the sphinx or centaur of the world of fable. Shall the Indian reservee share with his partner, the Government, its *aliquot* proportion of all the finny prey he drags from the bosom of lake and river, and of all the red deer he captures in the hunting-grounds common to both? And shall the Government account to its Indian associate for his *aliquot* part in value of whatever lands it may sell, and of whatever golden honey its agents may rifle from the hives of the wild bee? *Spectatum admisi risum teneatis, amici?*

It should be specially remarked, at this point, that the second article of the treaty does specify reservations, in the true sense; but its language is altogether different from that of the third article.

The former runs thus: "From the cession aforesaid, the following reservations are made, to wit: the reservation at Po-ca-gan's village for his band," &c.

7 Stat. at Large, p. 399.

But the third article employs entirely different phraseology:—"The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent."

Now, if the treaty was intended to embrace but one class of Indians, namely, reservees, why should their case, being one of perfect identity, be broken up and distributed into two separate articles? This question admits of no rational answer. But this is not all. The form, as well as the sense, of the words used in the second article differs, in every essential respect, from that used in the third. The former employs the present tense—"the reservations *are* made." The latter employs terms referring to the future—"the United States agree to grant." The former has relation to locality—"from the cession aforesaid, the following reservations are made." The latter is indefinite as to place—"the United States agree to grant," without saying where. In the former, the word "reservation" appears; in the latter, the technical term, "grant," having a totally opposite signification. How, then, can it be said, that all these variations in language indicate no sort of variation in sense? Did the framers of the treaty attempt to perform the impossible logical feat of making a distinction without a difference? Or, did they seek merely to diversify the style of the two articles for the sake of rhetorical effect? How, then, can the individual Indians, named in the third article of this treaty, be regarded as reservees, unless we first reject all the known rules of legitimate construction?

However, if it were even conceded that these particular Indians took by way of reservation, and not by grant, the inference would not follow that they thereby became tenants in common with the United States. Because, as has been already proved, the Indian right of occupancy is incapable of legal coalescence with any kind of tenure recognized in the law of civilized communities.

Moreover, it surely will not be contended, that the bare fact of a reservation being made has the effect to constitute the reservees ten-

ants in common with the Government. If that were indeed the case, then the Indians and Indian bands mentioned in the second article of the treaty became tenants in common with the United States. For instance, in the second article there is the reservation: "For the band of Mes-qua-buck, four sections, to include his village." Did the band of Mes-qua-buck thereby become tenants in common with the Government, as to all the lands embraced in the cession? Or, did the Government become tenant in common with the band of Mes-qua-buck, as to the four sections including his village?

But there remains, yet, another and more certain method of testing to a rigorous demonstration whether these Indian grantees can be considered as tenants in common with the United States. We may make the attempt to apply, as logical predicates, to these grantees and the United States, as the logical subject, all the several attributes which appertain to the species known in law as tenants in common, and if such a predication be found impossible, then demonstrably the relation of tenancy in common can not exist in the case. And this, by the way, is the sole process within the range of logical artifice, by which negative propositions can be established. The reasoning, *in abstracto*, rests on the self-evident axiom, that whatever objects of thought are wanting in any property which belongs universally to a given class, must necessarily be excluded from such class. Because, it is clear as consciousness itself, that if all X agrees, in conception, with Y, but no Z agrees with Y, then no Z can agree with X.

In accordance with this method, let me now proceed to employ several infallible tests for the determination of the immediate question in discussion, yet without breaking the order of divisions under the head still in hand.

4. The interest and possession of tenants in common is undivided *inter se*. Their occupation, though not their seizin, is *per my et per tout*. Or, to speak with more rigid propriety, the common possession is a real unity, and therefore, destitute of any physical parts. Litt. sec. 92; Com. Dig. Estates, k 8; Co. Litt. 189, a; Fisher *v.* Wigg, 1 Lord Raym. p. 329. 628

In the last case, Lord Holt said: "As to the case of a moiety to

one and his heirs, that is a tenancy in common; because it is an undivided moiety, and so proper. But if a feoffment was made of twenty acres, *habendum* ten acres to A, and ten acres to B, they are several tenants, and not tenants in common." This statement of the great Chief Justice reveals, as with a flash of light, the true nature of tenancy in common. Each tenant in common has a part of the whole. But it is a mathematical and *aliquot* part, and not a physical part. It is a part inseparable from the whole even in thought, except as the fraction of a general integer as yet unbroken.

In Fleming *v.* Kerr, 10 Watts, p. 444, the devise ran thus: "I give unto my wife, Margaret, one third part of the plantation I now live on, beginning at the river and to run back, also the house I live in; and after her death, I will that my daughter Susannah, shall have the above named one third part of the place I now live on, for her, her heirs and assigns forever. I will one third of the place I now live on to my son Joseph, with the stone and quarry on it, to him, his heirs and assigns forever. I will to my son George all the remaining part of my estate," &c.

It was held: "that the devisees did not take an estate in common." And President Grier states the unanswerable reason: "tenants in common have unity of possession of the whole; and on a writ of partition between tenants in common, the land is divided, not according to quantity, but value."

In Ross *v.* M'Junkin, 14 Serg. & Rawle, p. 364, two warrants to different persons were surveyed together, and a general diagram of surveys returned, without a division line, or anything to designate each tract as separate.

It was held: "that the grantees could not be considered as tenants in common. That their rights, as between themselves, were *suspended* until the subject of the grant to each should be specifically designated by the proper officer, or by themselves."

In delivering the opinion of the court, Justice Gibson said: "the original owners were grantees from the State, not of an undivided interest in the whole, but of separate and distinct parts of the whole. Consequently, they were not tenants in common. The grant to one

would not have entitled him to possession in common of the whole ; nor if one had been disseized, could he have recovered an undivided portion from the other. Tenants in common, although their estates be several, have each an undivided interest in the whole; but it can, with no propriety, be said, that each has an interest in the whole under the grant of a part. They could not join in trespass," &c.

Is not this masterly demonstration decisive of the question in discussion? For, no one will contend, that the particular grantees mentioned in the treaty were entitled to possession, *pro indiviso*, of all the lands specified in the cession. By no imaginable legal logic can it be maintained that the grant, or even reservation, of one half section to Francis Besion would give him a right to the possession of one hundred or one thousand sections; much less to hold and occupy an indefinite mass of lands as yet uncut by any surveyor's line. Besides, the grant to Francis Besion does not say that his half section shall be selected out of lands ceded by the treaty. Hence, upon the hypothesis assumed by the other side, Francis Besion might have extended his claim of possession to all the public domain, or, at the least, to all the parts unsurveyed at the time of the treaty.

Therefore, it is clear that the very first and most essential criterion of a tenancy in common operates to the rigorous exclusion of these Indian grantees from any such category, in connection with the United States.

5. Another test of tenancy in common is the undoubted rule, that the interest of a tenant in common gives him the right to an *aliquot* share of the whole value of the property held in common. Or, in technical phrase, he is entitled to owelty of partition. 1 Story's Eq. Jur. sec. 634.

But here, none of the Indian grantees could claim a share in the totality of value of all the lands ceded by the treaty. Francis Besion could put forth no pretension of right to the best half section, or even one of medium worth. On the contrary, the Government might select, at discretion any, even the very poorest in its domain

Hence, in this case the second great criterion of a tenancy in common fails altogether.

6. A third test of tenancy in common is, that one tenant in common can not convey any part of the land owned in common by metes and bounds. 4 Kent's Com. p. 368; Duncan *v.* Sylvester, 24 Maine p. 482; Peabody *v.* Minot, 24 Pick. p. 329; Great Falls Co. *v.* Worcester, 15 New Hamp. p. 412.

But will any one assert that the Government could not sell even one section of the territory acquired by the treaty, until the last of these Indian grantees had received his share by actual partition?

7. Another test of tenancy in common is, that tenants in common are reciprocally accountable for the reception of profits. 4 Kent's Com. p. 369.

But it would be even a ludicrous absurdity to predicate such a responsibility as between the United States and Francis Besion.

Therefore, all the *criteria* of tenancy in common fail in the case under consideration. Can this, then, be a tenancy in common which contains not one single attribute involved in the connotation of the term? As well might we imagine a case of space without extension, of time without sequence, of a triangle without sides or angles, of a man without any property of human nature.

II. But even if the doctrine asserted in the case of Mann and Hannah *v.* Wilson is to remain the rule of this court, the circumstances of the present case are such as to exclude it from the rule. Because, the half section of land selected by the President, and conveyed by patent to Francis Besion, formed no part of the territory ceded by the treaty of the 27th October, 1832; and therefore, could not be regarded, in any sense as a reservation.

By referring to the patent it appears that the land in controversy is divided into fractions by the intersection of the Kankakee river, and that much the larger part of it is south of that stream. Record, p. 50.

Now, by turning to the volume of Indian Treaties, it will be seen that the fraction of this half section situated on the south side of the Kankakee river, was acquired by the Government from the Kick-

apoo tribe of Indians by the treaty of July 30th, 1819. 7 Statutes at Large, p. 200.

In this last mentioned treaty, the Kankakee river is specified as the southern boundary of the cession then made; and therefore, the Indian title to the greater portion of the land now in litigation was extinguished more than forty years ago.

Moreover, we search in vain throughout the book of Indian Treaties to discover one line tending to show that any band of Potowatomies ever owned, or even pretended to own, a single foot of territory south of the Kankakee river; nor does history preserve the faintest trace of any such claim on the part of the tribe.

Hence, the southern fraction of this land could not fall within the cession of the Potowatomies made in 1832; and therefore, it could not have been a reservation from such cession: and therefore again, according to the doctrine of Mann and Hannah *v.* Wilson, Francis Besion could not, *quoad hoc*, have become a tenant in common with the United States: and hence, he had no power of conveyance.

Again: the Indian title to the part lying north of the Kankakee river was extinguished by the treaty of October 20th, 1832. 7 Statutes at Large, p. 378.

Here, the boundaries of the cession plainly embrace the northern fraction of the land described in the patent. Hence, this fraction could not have been within the cession of October 27th, 1832.

It is true that both treaties were made with Potowatomies, but these were of different tribes or bands, and the treaties are signed by Indian names altogether different. The first treaty was with the tribe of Indians of "the Prairie and Kankakee"; while the second was with "the Potowatomies of the State of Indiana and Michigan Territory." 7 Statutes at Large, pages 378 and 399.

But the first treaty ceded the lands from which the north fraction of the half section in question was subsequently selected; and the interest of Francis Besion originated under the last treaty. Hence, again, the north fraction never could have formed part of any reservation for Francis Besion; and therefore, as to that, he

could not have been a tenant in common with the United States.

I am aware of an opinion by some Attorney-General—though I am unable now to recall the passage—to the effect, that the two treaties above referred to really constituted but one treaty. But on what rational grounds such an opinion can stand it is difficult to conjecture. Because, there is not the slightest reference in either treaty to the other, or any implication of correlative existence, by which they might be incorporated into unity, according to the maxim, *verba illata inesse videntur.*

But may I not assume a bolder position? Can the Government, or the grantees of the Government, be permitted to allege that the two treaties were only one treaty? The Government saw proper to treat with the two bands of Potowatomies as different and wholly independent tribes. Shall not, then, the Government and its grantees be estopped from denying the verity of a fact admitted in the most solemn form?

The proposition may, therefore, I think, be deemed thoroughly demonstrated, that Francis Besion took no interest by way of reservation; and if he did so take, that such interest could not extend to either fraction of the land in question, for the plain reason that neither fraction was within the limits of the territory ceded by the treaty under which the interest of Francis Besion arises.

It may, however, be objected, that the patent to Francis Besion recites that this is the land to which he was entitled under the treaty; and therefore, that we are estopped from denying the fact so recited.

To this view there seem to be several decisive answers. In the first place, the patent shows that the interest of Francis Besion under the treaty was to take effect by way of grant, and not by way of reservation. Here, then, is the foundation of a contrary estoppel. But, to use the expression of Lord Coke, "estoppel against estoppel setteth the matter at large."

Secondly, the treaty does not say that the half section to be granted to Francis Besion should be selected out of the territory ceded at that time; nor does the patent express or imply that the half section actually conveyed was a part of any such territory. Hence, to

assert that this half section lies out of that territory does not contradict any thing affirmed in the patent; and therefore, we are not estopped from making the assertion.

In the third place, the recitals in a patent can estop no one from asserting what appears in a statute or treaty; because, of these the courts take judicial notice. A treaty is a law—the highest law. But an estoppel against the allegation of what is said in a law would indeed be a novelty in jurisprudence. And we have already seen that the land actually conveyed to Francis Besion by the patent is proved by former treaties not to have been included within the cession of October 27th, 1832. And therefore, it could not have been a reservation from that cession.

Hence, from all that has been said, the conclusion seems irresistible, that no legal title passed by mere operation of the treaty.

It may, however, be contended, that the legal title has been vested in the assignees of Francis Besion by one of three other methods, namely: by estoppel, by relation, or by force of the act of Congress of May 20th, 1836.

Let us, then, examine these several hypotheses in their order.

Estoppel.—The legal title could not come to the appellees by estoppel, for the following reasons:

1. At the date of the deed to Armstrong there was no particular land individuated to which any covenant could attach. A covenant can not run with that which is not *in esse*. Spencer's Case, 5 Coke, p. 16; Noke *v.* Awder, Croke Eliz. pages 373, 436; 1 Smith's L. C. p. 103.

2. An instrument creates no estoppel when the truth appears also in the same instrument. And here, the deed to Armstrong shows that his grantor had no title. Pargeter *v.* Harris, 7 Q. B. p. 708; 1 Smith's L. C. p. 119.

3. The deed to Armstrong only purports to convey his grantor's interest at its date. But in such case there is no estoppel. 2 Smith's

L. C. p. 556; Tillottson *v.* Kennedy, 5 Ala. p. 413; Blanchard *v.* Brooks, 12 Pick. p. 67; Comstock *v.* Smith, 13 Pick. p. 189.

I am aware that on this point there are contrary authorities which hold that a subsequently acquired interest will pass by estoppel, if it appears, from a fair construction of the entire deed, that the grantor contemplated such interest, and intended to convey it. Van Rensselaer *v.* Kerney, 11 How. p. 297.

But this latter rule will afford no aid to the appellees. Because, it is manifest on the face of the deed to Armstrong, that the grantor never contemplated, or intended to transfer, any title in fee, or so much as suspected that he was to have one himself. He calls his interest under the treaty a "reservation," which would be only an estate for life, if not sooner lost by abandonment; and he requests the President "to approve his conveyance"; thus evincing, in the clearest manner, his entire ignorance of the fact that under the treaty he was to take an unfettered fee.

4. As will be shown more fully in the sequel, the heirs of Francis Besion did not take this land by descent, but as purchasers. And if so, there could be no estoppel as against them.

Relation.—The legal title has not vested in the appellees by relation. Because, at the time of the treaty, there was no definite land individuated so as to be capable of transfer. But the fiction of relation supposes the subject of the grant to have passed at the date of the first act in the process of constituting title. That, however, would have been a plain impossibility in the present instance; because, the first act, here, namely, the treaty, did not describe any particular land. But if no land be described, nothing can pass. And the fiction of relation never assumes that to be true which is physically or legally impossible. Best on Presumptions, pages 25—27. In every case where the doctrine of relation has been applied, the land was designated by specific description, in the primary act which formed the basis of the fiction. Landes *v.* Brant, 10 How. p. 372.

Act of Congress.—Nor has the legal title vested in the appellees by virtue of the act of Congress of May 20th, 1836. See 5 Statutes at Large, p. 31.

The language of the act is, "that where a patent issues to a person deceased, the title shall enure to, and become vested in, his heirs, devisees, or assignees, as if the patent had been issued to the deceased person during life."

Now, the first remark suggested by the words of this statute is, that it does not express, or imply, any purpose to create heirs, any more than devisees or assignees. It only abrogates, *sub modo*, one rule of the common law, which declares all grants to deceased persons to be pure nullities. And it does this only in the prescribed case of "patents to deceased persons," and in favor of only three enumerated classes, namely, "heirs, devisees and assignees."

But the first two terms, "heirs and devisees," denote classes of persons recognized as having their appropriate *status* in the courts of law. Hence, the term, "assignees," used in the same connection, would seem also to denote a class of persons having their *locus standi* in the legal forum. If the statute was not intended to legitimate spurious issue, or render valid defective wills, so neither would it appear intended to acknowledge assignees repudiated at law.

But there was clearly no statute authorizing the prospective grantees under this treaty to transfer their future interests. And such a transfer was utterly prohibited and void at common law. Therefore, in this view as to the construction of the act of congress, no legal title vested in the appellees by assignment from Francis Besion.

However, the question, as to the construction of the act of Congress, is not, perhaps, *res integra*; since, this Court seems to have adopted a different rule in the case of Landes *v.* Brant, 10 How. p. 374: where it was intimated that the statute operates to vest the legal title in such assignees as would be recognized in courts of equity, as contra-distinguished from courts of common law.

Now, if this last construction be the true one—and I am willing to accept it as decisive of the present case—it follows as a necessary correlative, that the assignees indicated by the act of Congress must be such as, independently of the act, could go into the equitable *forum* and demand the legal title. And hence, results the fundamental question,—Have these appellees such equitable rights, by assign-

ment, as will enable them to prevail before a chancery tribunal? But this inquiry falls under the second great division of my argument, which remains to be touched presently.

FINALLY.—Under the first head of the general discussion, let it be assumed, *pro argumento*, that the appellees have the legal title, whether by the treaty, by estoppel, by relation, or by the act of Congress; nevertheless, they must inevitably fail in the present case, and for the very reason that they are owners of the legal title. Because, if they possess the legal title, they have a perfect remedy at law, and can find no standing in a court of equity. Hipp *v.* Babin, 19 How. p. 271.

B. My second general proposition under the first head is: that no equitable interest, susceptible of assignment, became vested in Francis Besion by mere operation of the treaty.

This affirmative is equally supported by most of the preceding arguments. Because, as no definite land was individuated by the terms of the treaty, there was no particular thing *in esse*, to which an equitable interest could attach. For, any interest, whether legal or equitable, must relate to some particular subject. There can be no interest or estate without a *corpus*, no attribute without a substance.

But the following may be exhibited as more special reasons in proof of the proposition:

1. An equitable owner has a right to receive the profits, and to dispose of the land in equity. 4 Kent's Com. p. 304.

But that could not be the case here: because, there was no land specified in the treaty, either to yield profits or constitute the subject of transfer.

2. Viewed in the most favorable light for the appellees, the treaty contained no more than an agreement on the part of the Political Power to make a grant *in futuro*. And therefore, until the Government acted on the subject matter, the treaty agreement conferred no right capable of recognition in any court of law or equity. Foster

v. Neilson, 2 Peters, p. 314; United States *v.* Anedondo, 6 Peters, p. 735.

For, certainly, it will not be contended, that at the date of the deed to Armstrong, years before the President had selected any land for Francis Besion, the latter could have gone into any Federal forum, with the slightest hope of maintaining any suit in relation to his interest. Hence, he had no sort of right or interest known in either legal or equitable jurisprudence, at the time of the sale to Armstrong. Hence, until all the laws of thought are reversed, we can not even imagine one to transmit what he does not possess, and, *a multo fortiori*, what does not even exist.

3. Francis Besion had, by the treaty, only an expectancy, or pure possibility; and that, too, dependent upon the double contingency of a selection by the President, and the emanation of a patent, before the death of the conditional granteee. But such an interest as that could give neither *jus ad rem* nor *jus in re*. 2 Story's Eq. Jur. sec. 1040.

Let it be admitted, however, that the first division of my argument has altogether failed, and that Francis Besion had some legal or equitable interest, yet still it is necessary for the appellees to show that they have obtained such interest by assignment. I shall, therefore, next, proceed to disprove this last supposition, which will bring me to several new heads in the reasoning.

Second. The deed to Armstrong was clearly void at common law, as being an attempt to transfer a future and non-existent interest.

On this point, the famous *regula* 14, of Bacon's Maxims, is decisive: *Licet dispositio de interesse futuro sit inutilis tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu.*

"The law," says the great philosophic jurist, "doth not allow of grants except there be a foundation of an interest in the grantor; for the law that will not accept of grants of titles, or of things in action which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But

of declarations precedent, before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigor to the declaration precedent." Bac. Max. reg. 14.

The "new act or conveyance," spoken of by Lord Bacon, must be one on the part of the grantor. Broom's Max. p. 377; Com. Dig. Grant. D.

But "the rule is the same at law and in equity, and a grant which does not pass the right of property in the former jurisdiction can not pass it in the latter. But equity regards every assignment or transfer which can not operate as an executed conveyance, as an executory contract, and will give it effect in one capacity, if it fail in the other." 2 Equity Lead. Cas. part 2, top page 224.

Therefore, the general subject of the argument becomes narrowed still more, and now touches the inquiry, whether the deed to Armstrong, viewed, not as a conveyance, but simply as a contract to convey, is such a contract as equity will specifically enforce, as against the heirs of Francis Besion or their grantees; and under the subsequent divisions I shall prove that such is not the case.

THIRD. No trust attached to the land in controversy, which can be enforced against the heirs of Francis Besion.

I. No trust attached to any land by the deed to Armstrong, for the cause so often repeated, to wit, because no definite land was described to which any trust could attach. But unless a trust be attached to, and run with, the land, there can be no decree as against an heir. 2 Story's Eq. Jur. sec. 790.

II. No trust descended with this land upon the heirs of Francis Besion, because they did not take this land by descent.

1. To bind the heir, in relation to any property, he must, *quoad hoc*, be in privity with his ancestor. 2 Story's Eq. Jur. sec. 788: 2 Black. Com. p. 201, note 2.

2. The heirs of Besion could not take by descent, because he was deceased long before the patent issued; and the heir, to take by de-

scent, must necessarily do so at the instant of the ancestor's death, or not at all.

3. If the legal title to this land ever became vested in the heirs of Francis Besion, it must have been by virtue of the act of Congress and of the patent issued to him and them. But in such case, the heirs would take as purchasers, and not by descent. And such was the explicit ruling, under precisely analogous circumstances, and after great consideration, in Goodell *v.* Jackson, 20 Johns. p. 706.

Hence, as the children of Francis Besion took this land as purchasers, it came to them free from all covenants and contracts of their ancestor.

COROLLARY. But if no trust, as to this land, could be enforced against the heirs of Besion, it is an irresistible inference, that no trust can be enforced against the grantees of such heirs.

FOURTH. There is no proof in the record that Francis Besion ever transferred his interest to Armstrong, or indeed to any one else. The deed produced was from Francis Bezayon. Printed Record, p. 52.

Besides, the acknowledgment was by Francis Bezayon, and was taken before a justice of the peace in the State of Indiana; but there is no certificate as to the character of the magistrate, such as is required by the laws of Illinois. Purple's Real Estate Statutes, p. 486; Act of Jan. 31, 1827.

FIFTH. The appellees have not brought themselves, by proper proofs, within the established rules indispensable to a decree.

I. Francis Besion had a mere promise of a gratuitous bounty from the Political Power; and the supposed assignment by him was void as being in contravention of public policy. He was a person to be peculiarly favored by courts of equity, as being, in a remarkable degree, *inops consillii*, and unfit to contract without, at least, the supervision of disinterested advisers. Jackson *v.* Wood, 7 Johns. p. 291; Goodell *v.* Jackson, 20 Johns. p. 692—708.

II. The deed to Armstrong bears, on its face, the strongest traces of fraud and unfairness.

1. It was made only eleven days after the approval of the treaty. The ink was scarcely dry on the paper which guaranteed to this unlettered child of the forest a future bounty from the Government, before the cunning speculator has managed to fasten upon the expectancy as his prey.

2. The deed recites that the grantor "desired to sell his interest for his own support and maintainance." And such an unusual clause indicates fraud. *Clausulæ inconsuetæ semper inducunt suspicionem.* Twyne's Case, 3 Coke, p. 80. The words reveal the stings of conscience, or the sense of shame, in the bosom of the grantee, and he attempts to put in the grantor's mouth some words of impotent justification.

3. The signature of the grantor is a mark, the old cross of the unlearned ages, and never, perhaps, was that symbol of celestial purity and divine hopes prostituted to a use at once so base and so contemptible. The inference is obvious, that the grantor could not write even his own name; and the natural presumption is violent, that he could not read.

Therefore, a court of equity will exact rigid proofs that the deed was read and explained to him. Selden *v.* Myers, 20 How. p. 506.

But we search in vain throughout this record for any evidence, even the faintest or most remote, on that subject.

III. The bill of the appellees does not allege that the consideration, expressed in the deed to Armstrong, was ever paid, nor is there in the testimony one particle of proof to that effect; although the answer denies such payment. Record, p. 16.

But courts of equity never decree specific performance, unless upon a contract certain and fair in all its parts, and for an adequate consideration. 2 Story's Eq. Jur. sec. 751.

IV. The bill does not allege payment of the promissory note

mentioned in the deed to Armstrong, and which was to secure one-fifth of the purchase money; nor is there any offer to pay it.

V. The bill, although it does not allege the payment of the consideration stated in the deed to Armstrong, avers its adequacy; but this stands denied by the sworn answer,—Record, p. 16,—and remains wholly destitute of proof.

VI. At the time of the supposed sale by Besion, it was impossible to determine, even approximately, the value of his future interest. Because the President might select a half section worth only five hundred dollars, or one worth five thousand, or even fifty thousand dollars. Therefore, as to the value, at least, the interest of Besion was a pure contingent expectancy. But in cases of this kind, where parties deal with expectants of future and contingent interests, courts of equity demand the greatest rigor of proofs, both as to the adequacy of the consideration, and the scrupulous fairness of the entire transaction. 1 Equity Lead. Cas. p. 411; Gowland *v.* De-Faria, 17 Ves. p. 70; Bantree *v.* Watson, 3 My. & K. p. 339; Davis *v.* Cooper, 5 My. & Cr. p. 270; Gwynne *v.* Heaton, 1 Bro. C. C. p. 9.

And, now, on the strength of the foregoing facts and principles, I beg leave to put the question the answer to which must present all the force and certainty of an *experimentum crusis*, for the solution of the problem at present before the court:—If Armstrong, the first assignee, and Francis Besion were both living, and this same bill were brought by the former against the latter, and the same sworn answer were put in, and the same proofs, and no more, were produced, could any tribunal of equity be found, in England or America, to decree a conveyance of the legal title from Besion to Armstrong? Would not the judge say, "show me, first of all, that the deed was read and explained to the illiterate child of the wilderness"? And then he would add, with a glow of just indignation, "show me, too, that this half-savage man, whose signature is the sign of the cross, had the aid of disinterested counsel from the beginning to the end of the negotiation which resulted in the deed before me. Make it clear as the sunlight, that the consideration was paid to the very last farthing. Disclose the proofs that demonstrate an equation betwixt price and value. Reveal the secrets of the soul,

and let me see the truth, as in a mirror,—the knowledge of the Indian as to what was the nature and worth of his expectancy, and his will, as to what he intended to convey. Else, avaunt, both you, and your unconscionable case, equally tainted with suspicion of unfairness, and reeking with the vile odors of fraud."

—Procul, o procul este, profani,
Conclamat vates, totoque absistite foro.

But if such would be the decree, in case the original parties to the deed were the parties litigant on the record, can the adjudication be different between their assignees? Can time or transmission uncloud a title, or purge away a fraud? *Assignatus utitur jure auctoris.* An assignee sits in the seat of his principal. Broom's Max. p. 350.

Therefore, whatever proofs would be requisite to sustain a bill against Francis Besion, if living, or when dead against his heirs, are equally necessary against the grantees of those heirs. The appellants stand before the bar of chancery, clothed with all the equitable rights and immunities which belonged to Francis Besion; while the appellees are clothed with every mark of fraud and unfair dealing which characterized the conduct of Armstrong. It is true the court can no longer, in a direct manner, punish the latter, or protect the former. The poor Indian has passed away forever. His fate has been like that of the great mass of his ill-starred race, who

"Have melted from the earth like snow
When streams are swol'n and south winds blow,
Dissolves in silent dew."

But Equity has still the power to exact an indirect justice in favor of the injured dead by maintaining the rights transmitted from his heirs. And Equity has also, and eternally, the higher prerogative to bid avaunt the semblance of a title originating in moral as well as legal wrong, and to brand the acts of fraud with infamy long after the perpetrator is mere dust and ashes.

Sixth. The appellants are protected against any equity, if such indeed ever existed, by their character as *bona fide* purchasers.

I. The bill avers notice to the appellants of the equitable title in

the appellees. Record, p. 10. The answer denies notice. Record, p. 15, 16. And the allegation of notice is not sustained by any evidence. The bill also avers that the appellants purchased for only a nominal sum. Record, p. 10. But the answer denies this and shows a valuable consideration. p. 15, 16.

Hence, these denials in the answer can only be overcome by the usual preponderance of adverse proofs. 2 Eq. Lead. Cas. part 1, p. 119; Carpenter *v.* Washington Ins. Co., 4 How. p. 217; Flagg *v.* Mann, 2 Sumner, p. 486.

II. Since the appellees are seeking to divest a superior and legal title, the *onus* lies upon them to prove both notice and want of consideration. 2 Eq. Lead. Cas. part 1, p. 121; Sullivan *v.* Bates, 1 Littell, p. 42; Mason *v.* Peck, 7 J. J. Mar. p. 301; Roberts *v.* Salisbury, 3 Gill & Johns. p. 425.

III. The recording of the deed to Armstrong, and of the several assignments attached to it, could not operate as notice to the appellants.

1. Because no land, capable of identification, was described in either the deed or assignments. Munroe *v.* McCormick, 6 Ire. Eq. p. 85. The description in the deed to Armstrong only indicated "*some* land which the United States had agreed to grant to Francis Besion," but without the faintest reference to locality. Hence, it would have been a physical impossibility for a purchaser, by an inspection of the record, to find any clew which might guide him to this half section on the Kankakee river.

2d. The recording alleged was prior to the emanation of the patent; and purchasers were not bound to search the record upwards beyond the date of the latter. Farmers' Loan and Trust Co. *v.* Matby, 8 Paige, p. 361; State of Connecticut *v.* Bradish, 14 Mass. p. 302; Moore *v.* Hunter, 1 Gilman, p. 331; 2 Eq. Lead. Cas. part 1, p. 162.

Moreover, if a purchaser, taking the surveyor's numbers of this half section, had searched the record upwards to the first page, he would have discovered no deed by which it had ever been conveyed;

because there was no deed on the record describing it even by implication.

IV. The answer denies any possession on the part of the appellees, on the south side of the Kankakee river. Record, p. 19; and this denial is supported by the deposition of Chatfield, a witness of the appellees. Record, p. 43—45.

Therefore, the court below erred in rendering a decree in favor of the appellees.

SEVENTH. The court erred in rendering a decree in favor of Dutcher, Powell and Thatcher. Because, the bill had been previously dismissed as to them. Record, p. 32. They were no longer parties to the record, and, of course, not entitled to a decree.

EIGHTH. The court erred in rendering a decree in favor of Baum, Rowley, and Robersham. Because the deposition of Chatfield shows them to have been deceased before the hearing. Record, p. 45. And it needs no argument to prove that a decree in behalf of a dead man is erroneous.

NINTH. The court erred, because there is no equity on the face of the bill.

TENTH. The court erred, because the material averments of the bill are not sustained by proper proofs.

Finally, from all that has been said, it appears to me that I am entitled to ask confidently that this decree may be reversed. I think that the living voice of the law, which is also the voice of true reason, imperatively commands a reversal. But it may be, perhaps, alleged, on the other side, that the calls of public policy are loud and eloquent in favor of affirmance; and that a thousand individual interests, connected with the question, thunder appeals to expediency to let the decision stand. It may indeed be so. But I, for one, beg leave to make my solemn protest against the entrance of any such considerations into this presence. They have no business here, where the stern spirit of the law is supposed to dwell incarnate. Their

the appellees. Record, p. 10. The answer denies notice. Record, p. 15, 16. And the allegation of notice is not sustained by any evidence. The bill also avers that the appellants purchased for only a nominal sum. Record, p. 10. But the answer denies this and shows a valuable consideration. p. 15, 16.

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Supreme Court of the United States.

TERM A. D. 1861.

JONATHAN CREWS et al.

vs.

HENRY L. BURCHAM et al.

Supreme Court of the United States.

No.....

JONATHAN CREWS, LYCURGUS SHERMAN, MASON G. SHERMAN and DAVID G. ROSE, Appellants,

vs.

HENRY L. BURCHAM, et al.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

The land in controversy is the east fractional half of fractional section twenty-four (on both sides of the Kankakee river), in township thirty-one, north of range thirteen, east of the third meridian, in the district of lands subject to sale at Chicago, Illinois.

All that part of the land in controversy lying south of the Kankakee river was acquired by the United States from the tribe of Kickapoo Indians, by the treaty of July 30th, 1819. 7 S. L. p. 200. And the Indian title to the part lying north of the Kankakee river was extinguished by the treaty of Oct. 20th, 1832. 7 S. L. p. 378.

On the 27th October, 1832, the chiefs and warriors of the Potowatomies of the State of Indiana and Michigan Territory, by treaty, ceded to the United States their title and interest to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River.

The second article of the treaty makes certain reservations from the cession.

The third article reads thus:—"The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." And *inter alios*,—

"For Francis Besion, one half section."

The third section closes with the sentence: "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys."

7 S. L. pages 399, 400.

In pursuance of the third article of this treaty, the President, by patent dated the 17th of February, 1845, granted to Francis Besion, and to his heirs, the land in controversy. See page 50 of the Record.

The appellees, being complainants in the court below, brought their bill in chancery, praying for a conveyance to them from the appellants, being defendants in the court below, of the parcel of land just described; and also for an injunction against an action of ejectment pending betwixt the same parties. Record, p. 3—11.

The court below rendered a final decree in accordance with the prayer of the bill; and to reverse that decree, this appeal is prosecuted. Record, p. 57, 58.

It is averred in the bill and admitted in the answer, that on the 29th of March, 1837, the land in litigation was selected by the President, for Francis Besion. Record, pages 4 and 14.

It is alleged in the bill and admitted in the answer, that Francis Besion died in the year 1843, and before the patent issued. Record, pages 9 and 21.

On the 4th of February, 1833, Francis Bezayon made a deed to one William Armstrong, purporting to convey the half section of land promised by the treaty, but without describing any particular tract. Record, p. 51.

This deed expresses a consideration of five hundred dollars, reciting that four-fifths were paid in hand, and a promissory note given for the remainder, payable on the completion of a perfect title. It also contains a covenant, that Francis Bezayon would make further assurance, "at the proper costs and charges of Armstrong, his heirs and assigns."

The deed has unusual clauses. It speaks of Bezayon's interest as a "reservation," and requests the President to assent to the convey-

ance. It sets forth, as a preliminary, "that Bezayon was desirous of selling his interest for his support and maintenance." The signature is by a cross mark.

On the 2d of September, 1836, Armstrong assigned his interest to Thomas T. Benbridge, by a writing attached to the deed of Bezayon. Record, p. 53.

On the 13th of August, 1842, by a writing in like manner attached, Benbridge assigned to James Mix, under whom the appellees claim by various subsequent assignments. Record, p. 54.

The bill alleges the sole and exclusive possession of the appellees. Record, p. 9.

The bill also avers the death of Francis Besion, and a conveyance of the land, by his heirs, to the appellants. Record, p. 9. And, by amendment, admits the legal title to be vested in the appellants, by such conveyance from the heirs of Besion. Record, p. 31.

The bill alleges that the appellants purchased with notice, and paid only a nominal consideration. Record, p. 10.

The bill calls for a sworn answer, p. 10; and the answer is verified by the oath of each defendant. p. 28.

The answer denies notice. p. 15, 16.

The answer denies the payment of the consideration mentioned in the deed from Berzayon to Armstrong, p. 16; nor does the bill itself aver such payment. And the record shows no proof of the fact.

The answer denies that the appellees ever had any possession of that part of the land lying south of the Kankakee river; but alleges that the same was vacant when the appellants purchased, and that the latter took, and continue to hold, peaceable possession thereof. Record, p. 19.

The answer denies that the conveyance from the heirs of Besion to the appellants was made for a nominal sum; but avers to the contrary, "that the same was made *bona fide*, and for a valuable consideration." Record, p. 26.

The deposition of William A. Chatfield, sole witness of the appellees, proves that the land south of the Kankakee river was vacant in 1853, and that the appellants are in possession of, and have improved, the same. Record, p. 43, 44, 45.

At the hearing of the cause the bill was dismissed, on motion of

the complainants, as to the three complainants, Jacob Dutcher, Thomas Powell and William M. Thatcher. Record, p. 32. Nevertheless, a final decree was entered in favor of these very persons. Record, p. 57.

At the hearing, the death of John Baum was suggested on the record, and his heirs at law were substituted, by name, in his stead. Record, p. 32. Yet a final decree is rendered in favor of this deceased John Baum, while no mention is made of his heirs. Record, p. 57.

The deposition of Chatfield shows that Baum, Rowley, Thatcher and Robersham were dead before the hearing. Record, p. 45. Yet a final decree is entered in the names of these four deceased persons, p. 57.

On the 24th of May, 1858, a petition for an injunction was filed in behalf of all the complainants in the bill. Record, p. 30. Yet Chatfield's deposition proves that, at that time, Baum, Robersham, Rowley and Thatcher were dead; and that Tompkins, Stokes, Schrigley, Lane, Swannell, Delori, Sarah Jane Bennet, Taylor, Symonds, Dutcher, Beedle and Peck did not authorize the application for an injunction. Record, p. 45.

POINTS FOR APPELLANTS.

For the appellants it is insisted—

First. That no interest, susceptible of assignment, vested in Besion by mere force of the treaty.

This proposition involves two others:—

A. No legal interest in the land vested.

B. No equitable interest vested.

Of these in their order.

A. No legal interest vested in Besion by the mere terms of the treaty.

REASONS.

I. The treaty contains no words of present grant. All its effective terms refer to the future. Broom's Max. p. 505; Co. Litt. 210, a; Longlois *v.* Coffin, 1 Carter's Rep. p. 446.

II. No interest in this land could pass by the treaty, because this land, as an individual thing, was not then *in esse*.

III. No legal interest passed. Because no particular land was described in the treaty. "If no lands are described, nothing can pass." Jackson *v.* Woodruff, 1 Cow. p. 286; Livingston *v.* Peru Iron Co., 9 Wend. 520; Blake *v.* Doherty, 5 Wheat. p. 362; United States *v.* King, 3 How. p. 786, 787.

IV. No interest would have passed, even had the treaty employed terms of present grant. Because the individual land would still have remained to be determined by subsequent election. Bullock's Case, 10 Eliz., Dyer, p. 281, cited 2 Co. Rep. p. 36; Hayward's Case, 2 Co. Rep. p. 36; Stukeley *v.* Butler, Hobart, p. 174; Bacon's Abridg. Grant, H. 3; Sheppard's Touchstone, p. 251; Haven *v.* Cram, 1 N. Hamp. p. 93; Canning *v.* Pinkham, *Id.* p. 356; Vandenburgh *v.* Van Bergen, 13 Johns. p. 217; Jackson *v.* Van Buren, *Id.* p. 525.

Objection. The case of Mann and Hannah *v.* Wilson, 23 How. p. 457, will be urged on the other side.

In answer, it is submitted,—

I. That the doctrine of that case cannot be maintained.

II. That the circumstances of that case are not similar to the present.

Of these in their order.

I. The grantees, under the treaty, could not be tenants in common with the United States, for these reasons:

1. That construction annuls the terms of the treaty, which says, "The lands shall be conveyed by patent."

2. That construction repudiates the principle of election.

3. The individual grantees did not take by way of *reservation*.

4. A tenant in common has possession of the whole, and consequently of every part, of the lands held in common. The right of occupation of each extends to every part, *pro indiviso*. Litt. sec. 292; Com. Di. Estates, K. 8; Fisher *v.* Wigg, 1 Lord Raym. p. 329; Fleming *v.* Kerr, 10 Watts, p. 444; Ross *v.* M'Junkin, 14 Serg. & Rawle, p. 364.

5. The interest of the tenant in common entitles him to an aliquot share in value, and not merely in the quantity of extension. 1 Stor. Eq. Jur. sec. 634.

6. Tenants in common have an equal right of entry, as to the whole land.

7. One tenant in common cannot convey any part of the land by metes and bounds. 4 Kent's Com. p. 368; Duncan *v.* Sylvester, 24 Maine, p. 482; Peabody *v.* Minot, 24 Pick. p. 329; Great Falls Co. *v.* Worcester, 15 N. Hamp. p. 412.

8. Tenants in common are reciprocally accountable for the reception of profits. 4 Kent's Com. p. 369.

9. If the Indian grantees took by way of reservation, they could only take the Indian right of *occupancy*. But that has no point of resemblance or analogy to common law tenures; and therefore the two species of title could not coalesce so as to form a tenancy in common. Fletcher *v.* Peck, 6 Cranch, p. 142; Johnson *v.* M'Intosh, 8 Wheat. p. 543.

II. But the rule in the case of Mann and Hannah *v.* Wilson does not include the facts of the present case.

Because, all that part of the land in controversy lying south of the Kankakee river was acquired by the United States, from the tribe of Kickapoo Indians, by the treaty of July 30th, 1819,—7 S. L. p. 200; and the Indian title to the part lying north of the Kankakee river was extinguished by the treaty of October 20th, 1832. 7 S. L. p. 378.

Hence, the conclusion is irresistible, that no legal title passed by mere operation of the treaty.

It may, however, be alleged, that there are three other methods by which the legal title has become vested in the appellees.

E. By estoppel.

F. By force of the act of Congress, passed May 20th, 1836.

G. By relation.

Of these in their order.

E. No legal title has vested in the appellees by estoppel, for these reasons:

1. At the date of Besion's deed there was no particular land *in esse* to which any covenant could attach. A covenant cannot run with that which does not exist. Spencer's Case, 5 Coke, p. 16; 1 Smith's L. C. p. 103; Noke *v.* Awder, Croke Eliz. p. 373, 436.

2. An instrument makes no estoppel where the truth appears by the same instrument. And here, the deed of Besion shows that he

had no title. 1 Smith's L. C. p. 119; Pargeter *v.* Harris, 7 Q. B. p. 708.

3. The deed of Besion only purports to convey the interest of the grantor at its date. And in such case there is no estoppel. 2 Smith's L. C. p. 556; Tillottson *v.* Kenerday, 5 Ala. p. 413; Blanchard *v.* Brooks, 12 Pick. p. 67; Comstock *v.* Smith, 13 Pick. p. 189.

4. The heirs of Besion did not take this land by descent. Hence, there could be no estoppel against them.

F. The legal title has not vested in the appellees by force of the act of Congress. 5 S. L. p. 31.

REASONS.

1. There was no law authorizing an assignment by Besion. And the act of Congress did not create assignees any more than it created heirs.

2. If the act of Congress vests the legal title in the equitable assignee, according to the case of Landes *v.* Brant, 10 How. p. 374, such assignee must be one who, independently of the act, could go into a court of equity, and call for the legal title. But this, we will show hereafter, the assignees of Besion could not do.

G. The legal title has not vested in the complainants by relation. Because, at the time of the treaty, no land was individuated so as to be capable of transfer. And the fiction by relation never assumes that to be true which is impossible. Best on Presump. p. 25, 26, 27. There is no case where the doctrine of relation has been applied to circumstances like these. See cases cited in Landes *v.* Brant, 10 How. p. 372.

Finally, under this head. If the appellees have the legal title, by the treaty, by estoppel, by act of Congress, or by relation, they have a perfect remedy at law. Hipp *v.* Babin, 19 How. p. 271.

For this reason, then, it is insisted, that the court erred in not dismissing the bill of the appellees.

B. No equitable interest vested in Besion by mere operation of the treaty.

This point is equally supported by all the preceding arguments. Because no particular land was defined in the treaty to which an equitable interest could attach.

SPECIAL REASONS.

1. An equitable owner has a right to the profits and to dispose of the land in equity. 4 Kent's Com. p. 304.

But here there was no land specified, either to yield profits or be the subject of transfer.

2. The treaty contained a mere promise by the political power to make a future grant. But such a promise confers no right capable of recognition in any court of justice. Foster *v.* Neilson, 2 Peters, p. 314; United States *v.* Arredondo, 6 Peters, p. 735.

3. Besion had, by the treaty, only an expectancy, or possibility. Hence, the assignment thereof could give neither *jus ad rem* nor *jus in re.* 2 Stor. Eq. Jur. sec. 1040.

Second. The conveyance from Besion to Armstrong was void at common law. Bacon's Max. *Regula*, 14; Broom's Max. p. 374; Com. Di. Grant, D.

The rule is the same in equity. 2 Eq. Lead. Cas., Part 2, p. 224.

OBJECTION. It may be urged, that equity will uphold such an assignment, and compel performance, when the assignor comes into possesion of the thing promised. 2 Eq. Lead. Cas. Part 2, p. 224.

The complete answer to this is, that Besion never came into possession of this land, never acquired any power of performance.

Third. No trust attached to this land which can be enforced against the heirs of Besion.

I. No trust attached to any land by the deed from Besion. Because, no land was described to which a trust could attach. But, unless a trust is attached to, and runs with, land, there can be no decree against the heir. 2 Stor. Eq. Jur. sec. 790.

II. No trust descended with this land upon the heirs of Besion. Because, they did not take by descent.

1. To bind the heir, in relation to any property, he must, *quoad hoc*, be in privity with his ancestor. 2 Stor. Eq. Jur. sec. 788; 2 Black. Com. p. 201, note 2.

2. The heirs of Besion could not take by descent. Because, Besion was dead when the patent issued. The heir, to be in by descent, must take at the instant of the ancestor's death.

3. If the legal title vested in the heirs of Besion at all, it was by

virtue of the act of Congress. Hence, the heirs took as purchasers, and not by descent. Goodell *v.* Jackson, 20 Johns. p. 706 *et seq.*

Therefore these heirs took, free from all covenants of the ancestor.

COROLLARY. But if no trust, as to this land, could be enforced against the heirs, none can be enforced against the assignees of the heirs.

Fourth. There is no competent proof in the record that Francis Besion ever transferred his interest. The deed produced was from Francis Bezayon. Record, p. 52. And there is no proof that this deed was ever executed by any one. The acknowledgement was taken before a justice of the peace in Indiana; but there is no certificate as to the character of the justice, such as is required by the laws of Illinois. Purple's Real Es. Stat. p. 486; Act of January 31, 1827.

Fifth. The appellees have not brought themselves, by proper proofs, within the rules indispensable to a decree.

I. Besion had a mere promise from the political power. And the assignment was contrary to public policy. Jackson *v.* Wood, 7 Johns. p. 291.

II. The appellees claim by assignment from a person *inops consilii*, and unfit to contract. Goodell *v.* Jackson, 20 Johns. 692, 706, 708.

III. The deed from Bezayon to Armstrong bears clear marks of fraud.

1. It was made only eleven days after the approval of the treaty.

2. It recites, "that Bezayon desired to sell for his support." This unusual clause indicates fraud. Twyne's Cas. 3 Co. Rep. p. 80.

3. Besion was unlettered. He could not write, and the presumption is, that he could not read. His signature is a mark. Hence, a court of equity will demand proof that the deed was read and explained to him. Selden *v.* Myers, 20 How. p. 506.

IV. There is no consideration for Bezayon's deed, either alleged or proved.

V. The bill contains no offer to pay the promissory note which secured one-fifth of the purchase money.

VI. There is no proof that the consideration stated in Bezayon's deed was adequate.

VII. At the time of the alleged sale by Bezayon, it was impossible to determine the value of the interest sold.

VIII. The interest of Besion was an expectancy. Hence, if assignable at all, the *onus* is upon the assignee to show that the bargain was reasonable, and the price given adequate. 1 Eq. Lead. Cas. p. 411.

But whatever proofs would be necessary against Besion, or his heirs, are equally necessary against the assignees of the heirs.

Sixth. The appellants are protected against any equity by their character of *bona fide* purchasers.

I. The bill avers notice, which is denied by the answer. The bill also avers that the appellants purchased for only a nominal sum. The answer denies this, and shows a valuable consideration. Hence, the answer can only be overcome by the usual preponderance of adverse proof. 2 Eq. Lead. Cas. Part 1, p. 119; Carpenter *v.* Washington Ins. Co., 4 How. p. 217; Flagg *v.* Mann, 2 Sumner, p. 486.

II. As the appellees are seeking to divest a superior and legal title, the *onus* lies with them to prove notice and want of consideration. 2 Eq. Lead. Cas., Part 1, p. 121; Sullivan *v.* Bates, 1 Littell, p. 42; Mason *v.* Peck, 7 J. J. Mar. p. 301; Roberts *v.* Salisbury, 3 Gill & Johns. p. 425.

III. The recording of Bezayon's deed, and the several assignments under it, could not operate as notice.

1. Because, no definite land was described, in either deed or assignments. Munroe *v.* McCormick, 6 Ire. Eq. p. 85.

2. Because, the recording was prior to the emanation of the patent. Farmers' Loan and Trust Co. *v.* Maltby, 8 Paige, p. 361; State of Conn. *v.* Bradish, 14 Mass. p. 302; Moore *v.* Hunter, 1 Gilman, p. 331; 2 Eq. L. C. Part 1, p. 162.

IV. The answer denies any possession on the part of the appellees on the south side of the Kankakee river. And this denial is sustained by the deposition of Chatfield.

Therefore, the court erred in giving a decree against the appellants.

Seventh. The court erred in rendering a decree in favor of Dutcher, Powell and Thatcher. Because, the bill had been previously dismissed as to them.

Eighth. The court erred in rendering a decree in favor of Baum, Rowley, Thatcher and Robersham. Because, the deposition of Chatfield proves that they were dead before the hearing. See Record, p. 45.

Ninth. The court erred, because there is no equity in the bill.

Tenth. The court erred, because the essential averments of the bill were not sustained by proof.

A. W. ARRINGTON &
S. S. BAXTER,
For Appellants.

663

Supreme Court of the United States.

NO. 88.

JONATHAN CREWS et al.

vs.

HENRY L. BURCHAM et al.

ARGUMENT FOR APPELLANTS,

BY

A. W. ARRINGTON, Esq.

Supreme Court of the United States.

NO. 88.

JONATHAN CREWS et al.

vs.

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ARGUMENT FOR APPELLANTS,

BY

A. W. ARRINGTON, Esq.

By treaty, on the 27th of Oct., 1832, the Potowatamies of the State of Indiana and Michigan Territory ceded to the United States their title to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River. The second article of this treaty makes certain reservations from the cession. And the third article reads thus:—"The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." A list of names and quantities ensues, and among others, the specification appears:—"For Francis Besion, one half section."

The third article closes with the sentence:—"The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys."

7 Statutes at Large, pages 399, 400.

The President, by patent, on the 17th of Feb., 1845, granted to Francis Besion and his heirs the land now in controversy. The appellants claim by deed from the heirs of Francis Besion, and their legal title is fully admitted in the bill of the appellees. See printed record, p. 31.

On the 4th of Feb., 1833, one Francis Bezayon made a deed to William Armstrong, purporting to convey the half section of land promised by the treaty, but without describing any particular tract. Record, p. 51. And the appellees claim under Armstrong.

It is averred in the bill of the appellees, and conceded by the answer of the appellants, that the half section was selected by the President for Francis Besion, on the 29th of March, 1837. Record, pages 4 and 14.

Francis Besion died in the year 1843, and before the emanation of the patent. Record, pages 9 and 21.

These are the cardinal facts from which a judicial determination of this case must be evolved; and having premised them thus briefly, I now invoke a patient hearing for my argument.

First. It is submitted, that no interest; as to the land in controversy, vested in Francis Besion by mere operation of the treaty.

But this proposition implies two others:—

A. No legal interest in the land vested;

B. No equitable interest vested.

These will be treated in their order.

A. No legal interest, in this land, vested in Francis Besion, by mere operation of the treaty.

This proposition rests on several independent premises, all of which are deemed logically coercive.

I. The treaty contains no words of present grant. On the contrary, all its effective terms have exclusive reference to the future.

It declares, "the reservations *shall be* selected under the direction of the President of the United States." But when? The treaty answers, "after the lands *shall have been* surveyed, and the boundaries to correspond with the public surveys."

Does it not seem impossible to confound the distinctions of tense in this phraseology? The reservations are not yet existent at the date of the treaty, but are to become, and that only after a contingent future event—"after the lands shall have been surveyed." Here, all the limitations of time are contra-distinguished by indelible marks. How, then, can it be pretended that what the treaty says shall be accomplished, *in futuro*, was actually accomplished at the very instant when the treaty itself was made? I am aware that imagination sometimes employs the license of very animated speech to represent both past and future as transferred into the present. This, however, never occurs in the solemn prose of a statute or treaty. And assuredly, no figure of rhetoric, no flight of poetic daring ever yet ventured to picture the present as a fact of the future.

The treaty says, moreover, that "the lands shall be conveyed by patent." Let me pause to analyze the separate *momenta* of this form of expression. "The lands shall be conveyed." Therefore, they were not then conveyed, *eodem tempore*, with the utterance of the treaty. "The lands shall be conveyed;" and to the question, *quo modo*? the answer given by the treaty is, "by patent." The land, the *res ipsa*, was to be conveyed, that is to say, "transmitted from one to another," by patent. But if by patent, then to a certainty, the land was not to be conveyed by any other species of transfer; and therefore, not by the treaty *per se*. *Expressio unius est exclusio alterius.* Broom's Max. p. 505.

It is conceded that, in sentences involving a high degree of generality, much caution is requisite in the application of the maxim just cited.

But in cases of specific assertion such as the present, it is but the simple enunciation of a logical formula, or a concise statement of a process of necessary thought. For example, it is clearly impossible to think of a single act of conveyance of the same person or thing as being both by land and by water. Because the two modes are

reciprocally exclusive. No more can one piece of property, real or personal, in the same act of transfer, be passed from one to another both by treaty and by patent. Hence, if this land was conveyed by treaty, from the Government to Francis Besion, nothing remained in the Government to be conveyed by patent. But the treaty itself says, "the land shall be conveyed by patent." Therefore, it could not be conveyed by treaty. It can scarcely be supposed that the United States intended to violate the old precept of Cicero—*actum ne agas*,—a precept, in its literal sense, perfectly futile, because the fact prohibited is impossible.

The construction of the treaty for which I contend has been sanctioned by an eminent judge of a State court, and upon the same principle of reasoning as that employed in the present argument. Longlois *v.* Coffin, 1 Carter's Indiana Rep. p. 446.

II. No interest in this land could pass by the treaty, because this land, as an individual thing had, then, no place in the category of real being. It had no "local habitation or name," or mark of identity to distinguish it from the great unmeasured mass of the newly acquired Federal domain. It existed only *in posse*, as a statue in the marble of mountains—a pure creation of the mind. But certainly, it needs no logic to show that what does not actually exist cannot be the subject of a conveyance, although it may be of an executory agreement.

III. No legal interest passed, because no definite land was described in the treaty. In the language of a well considered case, "if no lands are described, nothing can pass." Jackson *v.* Woodruff, 1 Cow. p. 286; Livingston *v.* Peru Iron Co., 9 Wend. p. 520. Or, to use the words of Chief Justice Marshall, "It is undoubtedly essential to the validity of a grant, that there should be *a thing* granted, which must be so described as to be capable of being distinguished from other things of the same kind." Blake *v.* Doherty, 5 Wheat. p. 362. And to the same effect is the case of United States *v.* King, 3 How. p. 786—787.

The principle announced in these cases, in its application to the present, may be exhibited in a demonstrative form by this plain di-

lemma. If any interest became vested in Francis Besion by pure force of the treaty, it must have been either an interest in some particular part of the public domain, or in all the public domain. But it could not be an interest in any definite part of the public domain; because no definite part was individuated in the treaty: and it could not be an interest in all the public domain; because the grant was to be, in terms as well as intention, of only one half section. Therefore, no interest vested by mere force of the treaty.

IV. No interest would have passed, even had the treaty employed terms of present grant. Because the individual land granted would still have remained to be determined by subsequent election.

I entreat especial attention, at this point of the argument, while I state, and attempt to solve, the general legal problem which must emerge in all such cases as this.

Suppose A has twenty horses, and sells or grants one of them to B, what then is the legal result effected?

Now to this question, only three possible answers can be given:

1. The property in one definite horse passes, and B becomes owner of that;

2. An undivided interest in all the twenty horses passes, and B becomes tenant in common with A in all; or,

3. No property of any sort passes, but B gains a bare right of election to choose one horse out of the twenty; and when the choice shall have been made, but not until then, the property in the horse chosen passes by virtue of the election.

I now proceed to show that the first two solutions are wholly untenable.

In the first place, the property in one definite horse can not pass; because no definite horse is individuated in the grant; and hence, it is clearly impossible to imagine any reason why one should pass rather than another.

Secondly, if the property in all the twenty horses passes, and B becomes, *ipso facto*, a tenant in common with A in all the twenty, then B has an equal right with A to the possession of all. But this is as manifestly contrary to the intention of the parties as to the terms of the grant. The grant is not of an *aliquot* share to the extent of one-twentieth part in value in the collective totality of the twenty horses, but of one horse, as an indeterminate individual, out of the twenty. And it is a plain contradiction in formal thought to predicate, that the grant of one horse can confer on the grantee a right to the possession of twenty.

Therefore, from all that has been said, the third supposition above stated affords the only rational solution of the problem enunciated.

And therefore, *a multi fortiori*, the grant of one half section undescribed out of an indefinite and immense mass of public lands, can pass no interest whatsoever, until election has individuated the thing granted.

It may, perhaps, be objected, that in cases where the power of election belongs to the grantor, the grantee takes a chose in action —the right to demand the due exercise of such power of election by the grantor.

The answer to this is two-fold and decisive. First, the hypothesis has no foundation in legal principle. On the contrary, if the party having the power to elect makes default, the only consequence is, that the right of election devolves on the other party. Com. Dig. Election, A. 2.

Secondly, if a case of election on the part of the grantor did imply the personal right of a chose in action on the part of the grantee, such chose in action would not be legally assignable; nor could it attach *ad rem* to any land; nor run against heirs or assignees. And certainly, no one will pretend that it could be enforced against the Government.

Thus stands the doctrine of election as a logical result of pure reason *in abstracto*. But the doctrine does not rest in theory alone. Since the day when it was first elaborated into judgment in the

Law French of Chief Justice Dyer, it has been cited by the great text-writers and, and reasserted by the highest courts.

BULLOCKS CASE, 10 Eliz., Dyer, p. 281, is the earliest instance I have been able to discover on the subject of election. The same is stated *in extenso*, 2 Co. Rep. p. 36.

The case was this. The Bishop of Sarum having a great wood of 1000 acres, enfeoffed another of a house and 17 acres of the wood, and made livery of the house.

It was held:— "that none of the wood passed *before election of* the *feoffee*, as to what part he would take." And also, "that this election must be exercised during the life of the feoffee; and that, therefore, his heir could not make such election."

It may, however, be asked, Why could not the heir exercise the power of election? For the invincible reason, that "no interest passed until election;" and hence, no interest of any nature descended to the heir.

To the same effect is the *fourth resolution* in HEYWARD'S CASE, 2 Co. Rep. p. 36:—"Where the things are several, *nothing passes before election*, and the election ought to be *precedent*. Therefore, if I have three horses, and I give you one of my horses, in this case the election ought to be made in the life of the parties; for inasmuch as none of the horses is given in certain, the *certainty, and thereby the property, begins by election.*"

The same resolution is transferred by Lord Coke into his Commentaries upon Littleton. Co. Litt. 145, a.

STUKELY *v.* BUTLER, Hobart's Rep. p. 174, lays down the rule thus—"Where election creates the interest, nothing passes till election. The vendee has no property till his election."

But it seems needless to adduce any more ancient authorities, since all the English cases declare, *unica voce*, the same doctrine. See Bacon's Abridg. Grant, H. 3; Sheppard's Touchstone, p. 251.

The American cases have also followed the rule. JACKSON *v.* VAN BUREN, 13 Johns. p. 525, is directly on the point. There, one hun-

dred acres of land, in a certain larger patent, were devised to M., "where she pleased to take the same, and to her heirs and assigns, forever."

It was held, "that no title to any particular part of the patent vested in M., and that she not having made any election in her lifetime, the right of election was gone, and could not be exercised by her heirs."

This doctrine was adjudged, too, in Vandenburgh *v.* Van Bergen, 13 John. p. 217; Haven *v.* Cram, 1 New Hamp. p. 93; Canning *v.* Pinkham, *Id.* p. 356.

At this stage of the argument, I beg permission to repeat what I have already presented, though in a different form. In reducing the doctrine of the cases previously cited to their ultimate analysis as the result of a process of reasoning, two considerations are apparent.

1. The principle of election is not a deduction from mere technical premises, but emanates as a necessary corollary from the laws of pure thinking. If I grant one of two things,—say, acres of land,—without designating which, it is impossible that the property should pass in both, or either, but by a contradiction of the terms of the grant. Let us call the supposed two acres respectively A and B. Let it then be assumed that the property in both passes. That is contradictory to the plain terms of the grant. Because the grant is not of both A and B, but of one only, and that one indeterminate as betwixt the two.

Again. Suppose A alone to pass, or B alone to pass. That equally contradicts the words and meaning of the grant. Because it annuls the alternative betwixt A and B. The grant is, in form, indeterminate betwixt A and B. But if one passes, the other cannot pass. And hence, the grant, on the hypothesis, would become determinate. But a grant, in relation to the same subject, cannot be both determinate and indeterminate. Therefore, it is absurd to affirm that either A or B can pass by such a grant *per se*, or without the occurrence of some ulterior fact.

2. The reason why the heir, in such cases, can not exercise the election is obvious. Because nothing passes until election. Therefore, if the election be not made before the death of the grantee, there is never any interest in the ancestor to be transmitted to the heir.

Hence, too, results the general corollary: that if the heir could exercise the power of election, since no interest descends unto him he would take as a purchaser, and not as an heir.

But the principle in discussion, in its application to the case before the court is far more cogent than in many of the examples quoted from the books. For here, the treaty contains no promise of any grant to heirs or assignees. The promise is to Francis Besion, and to him only.

However, let us now turn to the parallel case. Suppose the privilege of election to be, by express words, in the grantor. Such a case is evidently much stronger than that already considered, against even the possibility of any thing passing before election. Demonstrably so. Because the grant declares in terms, that the grantor shall, *out of a plurality*, select the *individual thing* which the grantee is to have as his own. Therefore, *ex necessitate*, the selection must be made before that thing can vest in the grantee. Must not the cause be anterior to the effect? Must not the condition precede its result? The consequent can not be posited even in thought, until the antecedent has called it into being.

But this difference, and this only, must be remarked between the cases of election by the grantor and by the grantee. The grantor can, by election, vest the property in the heir of the contingent grantee, as, after the death of such grantee before election, he can in any other person. The reason of this difference is manifest. Because the property remains in the power of the grantor, to be disposed of at his pleasure. But it is clear in such case, since nothing has descended to the heir, he must take as a purchaser, and, therefore, free from all claims against his ancestor. Or, to speak more correctly, *qua* this new acquisition of property, there is no ancestor.

And now, having reached this point, I have to encounter the most serious difficulty to be met with in my argument. I mean the case of MANN AND HANNAH *v.* WILSON, 23 How. p. 457.

It is not to be disputed, that the judgment in the case just mentioned was direct and positive to the effect: "that the individual grantees under this treaty took by way of reservation, and therefore, became, *ipso facto*, tenants in common with the United States; and thus had an existing legal interest in the land susceptible of sale and assignment." Nevertheless, I am constrained by a consciousness of duty, and with the utmost respect, to attempt the delicate task of invoking a consideration, *de novo*, of the doctrine thus announced; feeling, at the same time, the most undoubted assurance that if such doctrine shall be demonstrated to be utterly without support, whether on the basis of principle or authority, then this august tribunal will not hesitate, even an instant, to correct the mistake.

I shall now proceed to offer what I have to say on this part of the subject under two general heads:

I. That the judgment in the case of Mann and Hannah *v.* Wilson can not be sustained in the view of either principle or precedent.

II. That that case is not, in its essential circumstances, an analogue of the present.

I hasten to discuss these divisions in their order.

I. That the individual grantees under the treaty could not be, in any known sense of the term, tenants in common with the Government, may be proved by several independent lines of argument.

1. Such a construction would annul that essential part of the treaty which says, "the lands shall be conveyed by patent." Because, if the lands were conveyed by treaty, they could not, *inter eosdem partes*, be conveyed by patent, any more than a triangle can be made a square. But this point has been already sufficiently discussed.

2. That construction repudiates the principle of election so thoroughly grounded, as we have seen, both in reasons *a priori*, and the decisions of positive law.

3. The individual grantees under the treaty could not take any interest by way of reservation.

The certainty of this proposition is apparent from several considerations.

In the first place, reservations, by Indian treaties, have been uniformly regarded as exceptions out of the territory ceded, and therefore, mere continuations of the old Indian title. Mann and Hannah *v.* Wilson, 20 How. p. 463. Hence, reservations are not the grants of any new title or interest. They but preserve the *status quo ante pactionem.*

But in this case, the interest contemplated as being about to be conferred upon the particular Indians named in the third article of the treaty, was, by express terms, to take effect *in futuro.*

But such a relation to future time is absolutely in contradiction to the nature of a reservation, which operates only *in præsenti*, and that not to produce, but only to prevent, an effect that would otherwise happen, namely, the cession of the definite part so reserved.

In the second place, if the interest of the particular Indians mentioned in the treaty had been vested immediately by way of reservation, such interest, as has been shown, would be merely the former Indian title of occupancy.

But this latter title always existed, before the treaty, in the Indian tribe, while the ultimate fee was always in the Government. Yet the thought never entered into the mind of a court to infer, from the fact of the concurrence of these two species of title as to the same land, that the Indian tribes and the United States were tenants in common. Can a reason, then, be imagined why the treaty which, as to the reservations, does not extinguish or change the Indian title, should have the strange efficacy to convert the Indian reservees into common tenants with the Government in the public domain? The supposition is contrary to one of the fundamental axioms in the Inductive Logic,—"that no new effect, in a given state of circumstances, can be produced, without the intervention of a change in the antecedents."

In the third place, the Indian right of occupancy has no sort of analogy or similitude to any kind of tenure known in American law. The occupancy of the Indians, even in regard to one another, is no

more than the original natural right of the savage state, the right of hunting and fishing, and of a temporary use, for ever lost the instant it is abandoned, and then ready to be acquired by the first new comer. Jackson *v.* Porter, Paine's Rep. p. 457; Fletcher *v.* Peck, 6 Cranch, p. 142; Johnson *v.* M'Intosh, 8 Wheat. p. 543.

The individual Indians never were tenants in common, in the legal sense of the term, even *inter se*. No single Indian had any definite or *aliquot* share in value in any lands of the tribe, much less in the whole territory. No one was entitled to partition, or accountable for the reception of profits. Each one had the savage right of the first occupant, limited in space by a mere *pedis positio*, and in time, by duration of residence. His title, in respect to any particular locality, was scarcely higher than that of the beaver to the hut in which it passes its winter.

Is it not, then, utterly inconceivable that such a vagrant right as this should coalesce with a title in fee so as to result in a tenancy in common, as between the holders of estates as heterogeneous as fire and water? Can it be possible to affirm such a relation, unless indeed we might suppose the Government itself to turn hunter and fisher, as well as temporary occupant, with a possession flitting from prairie to forest, at every change of the seasons? What kind of a tenancy in common is that which blends the natural right of occupancy into legal unity with the technical titles of our Anglo-American law? The two species of right have not a single point in common by which they might be conjoined; and their union could only generate a legal birth as fantastic as the sphinx or centaur of the world of fable. Shall the Indian reservee share with his partner, the Government, its *aliquot* proportion of all the finny prey he drags from the bosom of lake and river, and of all the red deer he captures in the hunting-grounds common to both? And shall the Government account to its Indian associate for his *aliquot* part in value of whatever lands it may sell, and of whatever golden honey its agents may rifle from the hives of the wild bee? *Spectatum admisi risum teneatis, amici?*

It should be specially remarked, at this point, that the second article of the treaty does specify reservations, in the true sense; but its language is altogether different from that of the third article.

The former runs thus: "From the cession aforesaid, the following reservations are made, to wit: the reservation at Po-ca-gan's village for his band," &c.

7 Stat. at Large, p. 399.

But the third article employs entirely different phraseology:—"The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent."

Now, if the treaty was intended to embrace but one class of Indians, namely, reservees, why should their case, being one of perfect identity, be broken up and distributed into two separate articles? This question admits of no rational answer. But this is not all. The form, as well as the sense, of the words used in the second article differs, in every essential respect, from that used in the third. The former employs the present tense—"the reservations *are* made." The latter employs terms referring to the future—"the United States agree to grant." The former has relation to locality—"from the cession aforesaid, the following reservations are made." The latter is indefinite as to place—"the United States agree to grant," without saying where. In the former, the word "reservation" appears; in the latter, the technical term, "grant," having a totally opposite signification. How, then, can it be said, that all these variations in language indicate no sort of variation in sense? Did the framers of the treaty attempt to perform the impossible logical feat of making a distinction without a difference? Or, did they seek merely to diversify the style of the two articles for the sake of rhetorical effect? How, then, can the individual Indians, named in the third article of this treaty, be regarded as reservees, unless we first reject all the known rules of legitimate construction?

However, if it were even conceded that these particular Indians took by way of reservation, and not by grant, the inference would not follow that they thereby became tenants in common with the United States. Because, as has been already proved, the Indian right of occupancy is incapable of legal coalescence with any kind of tenure recognized in the law of civilized communities.

Moreover, it surely will not be contended, that the bare fact of a reservation being made has the effect to constitute the reservees ten-

ants in common with the Government. If that were indeed the case, then the Indians and Indian bands mentioned in the second article of the treaty became tenants in common with the United States. For instance, in the second article there is the reservation: "For the band of Mes-qua-buck, four sections, to include his village." Did the band of Mes-qua-buck thereby become tenants in common with the Government, as to all the lands embraced in the cession? Or, did the Government become tenant in common with the band of Mes-qua-buck, as to the four sections including his village?

But there remains, yet, another and more certain method of testing to a rigorous demonstration whether these Indian grantees can be considered as tenants in common with the United States. We may make the attempt to apply, as logical predicates, to these grantees and the United States, as the logical subject, all the several attributes whtch appertain to the species known in law as tenants in common, and if such a predication be found impossible, then demonstrably the relation of tenancy in common can not exist in the case. And this, by the way, is the sole process within the range of logical artifice, by which negative propositions can be established. The reasoning, *in abstracto*, rests on the self-evident axiom, that whatever objects of thought are wanting in any property which belongs universally to a given class, must necessarily be excluded from such class. Because, it is clear as consciousness itself, that if all X agrees, in conception, with Y, but no Z agrees with Y, then no Z can agree with X.

In accordance with this method, let me now proceed to employ several infallible tests for the determination of the immediate question in discussion, yet without breaking the order of divisions under the head still in hand.

4. The interest and possession of tenants in common is undivided *inter se*. Their occupation, though not their seizin, is *per my et per tout*. Or, to speak with more rigid propriety, the common possession is a real unity, and therefore, destitute of any physical parts. Litt. sec. 92; Com. Dig. Estates, k 8; Co. Litt. 189, a; Fisher *v.* Wigg, 1 Lord Raym. p. 329.

In the last case, Lord Holt said: "As to the case of a moiety to

one and his heirs, that is a tenancy in common; because it is an undivided moiety, and so proper. But if a feoffment was made of twenty acres, *habendum* ten acres to A, and ten acres to B, they are several tenants, and not tenants in common." This statement of the great Chief Justice reveals, as with a flash of light, the true nature of tenancy in common. Each tenant in common has a part of the whole. But it is a mathematical and *aliquot* part, and not a physical part. It is a part inseparable from the whole even in thought, except as the fraction of a general integer as yet unbroken.

In Fleming *v.* Kerr, 10 Watts, p. 444, the devise ran thus: "I give unto my wife, Margaret, one third part of the plantation I now live on, beginning at the river and to run back, also the house I live in; and after her death, I will that my daughter Susannah, shall have the above named one third part of the place I now live on, for her, her heirs and assigns forever. I will one third of the place I now live on to my son Joseph, with the stone and quarry on it, to him, his heirs and assigns forever. I will to my son George all the remaining part of my estate," &c.

It was held: "that the devisees did not take an estate in common." And President Grier states the unanswerable reason: "tenants in common have unity of possession of the whole; and on a writ of partition between tenants in common, the land is divided, not according to quantity, but value."

In Ross *v.* M'Junkin, 14 Serg. & Rawle, p. 364, two warrants to different persons were surveyed together, and a general diagram of surveys returned, without a division line, or anything to designate each tract as separate.

It was held: "that the grantees could not be considered as tenants in common. That their rights, as between themselves, were *suspended* until the subject of the grant to each should be specifically designated by the proper officer, or by themselves."

In delivering the opinion of the court, Justice Gibson said: "the original owners were grantees from the State, not of an undivided interest in the whole, but of separate and distinct parts of the whole. Consequently, they were not tenants in common. The grant to one

would not have entitled him to possession in common of the whole ; nor if one had been disseized, could he have recovered an undivided portion from the other. Tenants in common, although their estates be several, have each an undivided interest in the whole ; but it can, with no propriety, be said, that each has an interest in the whole under the grant of a part. They could not join in trespass," &c.

Is not this masterly demonstration decisive of the question in discussion? For, no one will contend, that the particular grantees mentioned in the treaty were entitled to possession, *pro indiviso*, of all the lands specified in the cession. By no imaginable legal logic can it be maintained that the grant, or even reservation, of one half section to Francis Besion would give him a right to the possession of one hundred or one thousand sections ; much less to hold and occupy an indefinite mass of lands as yet uncut by any surveyor's line. Besides, the grant to Francis Besion does not say that his half section shall be selected out of lands ceded by the treaty. Hence, upon the hypothesis assumed by the other side, Francis Besion might have extended his claim of possession to all the public domain, or, at the least, to all the parts unsurveyed at the time of the treaty.

Therefore, it is clear that the very first and most essential criterion of a tenancy in common operates to the rigorous exclusion of these Indian grantees from any such category, in connection with the United States.

5. Another test of tenancy in common is the undoubted rule, that the interest of a tenant in common gives him the right to an *aliquot* share of the whole value of the property held in common. Or, in technical phrase, he is entitled to owelty of partition. 1 Story's Eq. Jur. sec. 634.

But here, none of the Indian grantees could claim a share in the totality of value of all the lands ceded by the treaty. Francis Besion could put forth no pretension of right to the best half section, or even one of medium worth. On the contrary, the Government might select, at discretion any, even the very poorest in its domain

Hence, in this case the second great criterion of a tenancy in common fails altogether.

6. A third test of tenancy in common is, that one tenant in common can not convey any part of the land owned in common by metes and bounds. 4 Kent's Com. p. 368; Duncan *v.* Sylvester, 24 Maine p. 482; Peabody *v.* Minot, 24 Pick. p. 329; Great Falls Co. *v.* Worcester, 15 New Hamp. p. 412.

But will any one assert that the Government could not sell even one section of the territory acquired by the treaty, until the last of these Indian grantees had received his share by actual partition?

7. Another test of tenancy in common is, that tenants in common are reciprocally accountable for the reception of profits. 4 Kent's Com. p. 369.

But it would be even a ludicrous absurdity to predicate such a responsibility as between the United States and Francis Besion.

Therefore, all the *criteria* of tenancy in common fail in the case under consideration. Can this, then, be a tenancy in common which contains not one single attribute involved in the connotation of the term? As well might we imagine a case of space without extension, of time without sequence, of a triangle without sides or angles, of a man without any property of human nature.

II. But even if the doctrine asserted in the case of Mann and Hannah *v.* Wilson is to remain the rule of this court, the circumstances of the present case are such as to exclude it from the rule. Because, the half section of land selected by the President, and conveyed by patent to Francis Besion, formed no part of the territory ceded by the treaty of the 27th October, 1832; and therefore, could not be regarded, in any sense as a reservation.

By referring to the patent it appears that the land in controversy is divided into fractions by the intersection of the Kankakee river, and that much the larger part of it is south of that stream. Record, p. 50.

Now, by turning to the volume of Indian Treaties, it will be seen that the fraction of this half section situated on the south side of the Kankakee river, was acquired by the Government from the Kick-

apoo tribe of Indians By the treaty of July 30th, 1819. 7 Statutes at Large, p. 200.

In this last mentioned treaty, the Kankakee river is specified as the southern boundary of the cession then made; and therefore, the Indian title to the greater portion of the land now in litigation was extinguished more than forty years ago.

Moreover, we search in vain throughout the book of Indian Treaties to discover one line tending to show that any band of Potowatomies ever owned, or even pretended to own, a single foot of territory south of the Kankakee river; nor does history preserve the faintest trace of any such claim on the part of the tribe.

Hence, the southern fraction of this land could not fall within the cession of the Potowatomies made in 1832; and therefore, it could not have been a reservation from such cession; and therefore again, according to the doctrine of Mann and Hannah *v.* Wilson, Francis Besion could not, *quoad hoc*, have become a tenant in common with the United States: and hence, he had no power of conveyance.

Again: the Indian title to the part lying north of the Kankakee river was extinguished by the treaty of October 20th, 1832. 7 Statutes at Large, p. 378.

Here, the boundaries of the cession plainly embrace the northern fraction of the land described in the patent. Hence, this fraction could not have been within the cession of October 27th, 1832.

It is true that both treaties were made with Potowatomies, but these were of different tribes or bands, and the treaties are signed by Indian names altogether different. The first treaty was with the tribe of Indians of "the Prairie and Kankakee"; while the second was with "the Potowatomies of the State of Indiana and Michigan Territory." 7 Statutes at Large, pages 378 and 399.

But the first treaty ceded the lands from which the north fraction of the half section in question was subsequently selected; and the interest of Francis Besion originated under the last treaty. Hence, again, the north fraction never could have formed part of any reservation for Francis Besion; and therefore, as to that, he

could not have been a tenant in common with the United States.

I am aware of an opinion by some Attorney-General—though I am unable now to recall the passage—to the effect, that the two treaties above referred to really constituted but one treaty. But on what rational grounds such an opinion can stand it is difficult to conjecture. Because, there is not the slightest reference in either treaty to the other, or any implication of correlative existence, by which they might be incorporated into unity, according to the maxim, *verba illata inesse videntur.*

But may I not assume a bolder position? Can the Government, or the grantees of the Government, be permitted to allege that the two treaties were only one treaty? The Government saw proper to treat with the two bands of Potowatomies as different and wholly independent tribes. Shall not, then, the Government and its grantees be estopped from denying the verity of a fact admitted in the most solemn form?

The proposition may, therefore, I think, be deemed thoroughly demonstrated, that Francis Besion took no interest by way of reservation; and if he did so take, that such interest could not extend to either fraction of the land in question, for the plain reason that neither fraction was within the limits of the territory ceded by the treaty under which the interest of Francis Besion arises.

It may, however, be objected, that the patent to Francis Besion recites that this is the land to which he was entitled under the treaty; and therefore, that we are estopped from denying the fact so recited.

To this view there seem to be several decisive answers. In the first place, the patent shows that the interest of Francis Besion under the treaty was to take effect by way of grant, and not by way of reservation. Here, then, is the foundation of a contrary estoppel. But, to use the expression of Lord Coke, "estoppel against estoppel setteth the matter at large."

Secondly, the treaty does not say that the half section to be granted to Francis Besion should be selected out of the territory ceded at that time; nor does the patent express or imply that the half section actually conveyed was a part of any such territory. Hence, to

assert that this half section lies out of that territory does not contradict any thing affirmed in the patent; and therefore, we are not estopped from making the assertion.

In the third place, the recitals in a patent can estop no one from asserting what appears in a statute or treaty; because, of these the courts take judicial notice. A treaty is a law—the highest law. But an estoppel against the allegation of what is said in a law would indeed be a novelty in jurisprudence. And we have already seen that the land actually conveyed to Francis Besion by the patent is proved by former treaties not to have been included within the cession of October 27th, 1832. And therefore, it could not have been a reservation from that cession.

Hence, from all that has been said, the conclusion seems irresistible, that no legal title passed by mere operation of the treaty.

It may, however, be contended, that the legal title has been vested in the assignees of Francis Besion by one of three other methods, namely: by estoppel, by relation, or by force of the act of Congress of May 20th, 1836.

Let us, then, examine these several hypotheses in their order.

Estoppel.—The legal title could not come to the appellees by estoppel, for the following reasons:

1. At the date of the deed to Armstrong there was no particular land individuated to which any covenant could attach. A covenant can not run with that which is not *in esse*. Spencer's Case, 5 Coke, p. 16; Noke *v.* Awder, Croke Eliz. pages 373, 436; 1 Smith's L. C. p. 103.

2. An instrument creates no estoppel when the truth appears also in the same instrument. And here, the deed to Armstrong shows that his grantor had no title. Pargeter *v.* Harris, 7 Q. B. p. 708; 1 Smith's L. C. p. 119.

3. The deed to Armstrong only purports to convey his grantor's interest at its date. But in such case there is no estoppel. 2 Smith's

L. C. p. 556; Tillottson *v.* Kennedy, 5 Ala. p. 413; Blanchard *v.* Brooks, 12 Pick. p. 67; Comstock *v.* Smith, 13 Pick. p. 189.

I am aware that on this point there are contrary authorities which hold that a subsequently acquired interest will pass by estoppel, if it appears, from a fair construction of the entire deed, that the grantor contemplated such interest, and intended to convey it. Van Rensselaer *v.* Kerney, 11 How. p. 297.

But this latter rule will afford no aid to the appellees. Because, it is manifest on the face of the deed to Armstrong, that the grantor never contemplated, or intended to transfer, any title in fee, or so much as suspected that he was to have one himself. He calls his interest under the treaty a "reservation," which would be only an estate for life, if not sooner lost by abandonment; and he requests the President "to approve his conveyance"; thus evincing, in the clearest manner, his entire ignorance of the fact that under the treaty he was to take an unfettered fee.

4. As will be shown more fully in the sequel, the heirs of Francis Besion did not take this land by descent, but as purchasers. And if so, there could be no estoppel as against them.

Relation.—The legal title has not vested in the appellees by relation. Because, at the time of the treaty, there was no definite land individuated so as to be capable of transfer. But the fiction of relation supposes the subject of the grant to have passed at the date of the first act in the process of constituting title. That, however, would have been a plain impossibility in the present instance; because, the first act, here, namely, the treaty, did not describe any particular land. But if no land be described, nothing can pass. And the fiction of relation never assumes that to be true which is physically or legally impossible. Best on Presumptions, pages 25—27. In every case where the doctrine of relation has been applied, the land was designated by specific description, in the primary act which formed the basis of the fiction. Landes *v.* Brant, 10 How. p. 372.

Act of Congress.—Nor has the legal title vested in the appellees by virtue of the act of Congress of May 20th, 1836. See 5 Statutes at Large, p. 31.

The language of the act is, "that where a patent issues to a person deceased, the title shall enure to, and become vested in, his heirs, devisees, or assignees, as if the patent had been issued to the deceased person during life."

Now, the first remark suggested by the words of this statute is, that it does not express, or imply, any purpose to create heirs, any more than devisees or assignees. It only abrogates, *sub modo*, one rule of the common law, which declares all grants to deceased persons to be pure nullities. And it does this only in the prescribed case of "patents to deceased persons," and in favor of only three enumerated classes, namely, "heirs, devisees and assignees."

But the first two terms, "heirs and devisees," denote classes of persons recognized as having their appropriate *status* in the courts of law. Hence, the term, "assignees," used in the same connection, would seem also to denote a class of persons having their *locus standi* in the legal forum. If the statute was not intended to legitimate spurious issue, or render valid defective wills, so neither would it appear intended to acknowledge assignees repudiated at law.

But there was clearly no statute authorizing the prospective grantees under this treaty to transfer their future interests. And such a transfer was utterly prohibited and void at common law. Therefore, in this view as to the construction of the act of congress, no legal title vested in the appellees by assignment from Francis Besion.

However, the question, as to the construction of the act of Congress, is not, perhaps, *res integra*; since, this Court seems to have adopted a different rule in the case of Landes *v.* Brant, 10 How. p. 374: where it was intimated that the statute operates to vest the legal title in such assignees as would be recognized in courts of equity, as contra-distinguished from courts of common law.

Now, if this last construction be the true one—and I am willing to accept it as decisive of the present case—it follows as a necessary correlative, that the assignees indicated by the act of Congress must be such as, independently of the act, could go into the equitable *forum* and demand the legal title. And hence, results the fundamental question,—Have these appellees such equitable rights, by assign-

ment, as will enable them to prevail before a chancery tribunal? But this inquiry falls under the second great division of my argument, which remains to be touched presently.

FINALLY.—Under the first head of the general discussion, let it be assumed, *pro argumento*, that the appellees have the legal title, whether by the treaty, by estoppel, by relation, or by the act of Congress; nevertheless, they must inevitably fail in the present case, and for the very reason that they are owners of the legal title. Because, if they possess the legal title, they have a perfect remedy at law, and can find no standing in a court of equity. Hipp *v.* Babin, 19 How. p. 271.

B. My second general proposition under the first head is: that no equitable interest, susceptible of assignment, became vested in Francis Besion by mere operation of the treaty.

This affirmative is equally supported by most of the preceding arguments. Because, as no definite land was individuated by the terms of the treaty, there was no particular thing *in esse*, to which an equitable interest could attach. For, any interest, whether legal or equitable, must relate to some particular subject. There can be no interest or estate without a *corpus*, no attribute without a substance.

But the following may be exhibited as more special reasons in proof of the proposition:

1. An equitable owner has a right to receive the profits, and to dispose of the land in equity. 4 Kent's Com. p. 304.

But that could not be the case here: because, there was no land specified in the treaty, either to yield profits or constitute the subject of transfer.

2. Viewed in the most favorable light for the appellees, the treaty contained no more than an agreement on the part of the Political Power to make a grant *in futuro*. And therefore, until the Government acted on the subject matter, the treaty agreement conferred no right capable of recognition in any court of law or equity. Foster

v. Neilson, 2 Peters, p. 314; United States *v.* Anedondo, 6 Peters, p. 735.

For, certainly, it will not be contended, that at the date of the deed to Armstrong, years before the President had selected any land for Francis Besion, the latter could have gone into any Federal forum, with the slightest hope of maintaining any suit in relation to his interest. Hence, he had no sort of right or interest known in either legal or equitable jurisprudence, at the time of the sale to Armstrong. Hence, until all the laws of thought are reversed, we can not even imagine one to transmit what he does not possess, and, *a multo fortiori*, what does not even exist.

3. Francis Besion had, by the treaty, only an expectancy, or pure possibility; and that, too, dependent upon the double contingency of a selection by the President, and the emanation of a patent, before the death of the conditional grantee. But such an interest as that could give neither *jus ad rem* nor *jus in re*. 2 Story's Eq. Jur. sec. 1040.

Let it be admitted, however, that the first division of my argument has altogether failed, and that Francis Besion had some legal or equitable interest, yet still it is necessary for the appellees to show that they have obtained such interest by assignment. I shall, therefore, next, proceed to disprove this last supposition, which will bring me to several new heads in the reasoning.

SECOND. The deed to Armstrong was clearly void at common law, as being an attempt to transfer a future and non-existent interest.

On this point, the famous *regula* 14, of Bacon's Maxims, is decisive: *Licet dispositio de interesse futuro sit inutilis tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu.*

"The law," says the great philosophic jurist, "doth not allow of grants except there be a foundation of an interest in the grantor; for the law that will not accept of grants of titles, or of things in action which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But

of declarations precedent, before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigor to the declaration precedent." Bac. Max. reg. 14.

The "new act or conveyance," spoken of by Lord Bacon, must be one on the part of the grantor. Broom's Max. p. 377; Com. Dig. Grant. D.

But "the rule is the same at law and in equity, and a grant which does not pass the right of property in the former jurisdiction can not pass it in the latter. But equity regards every assignment or transfer which can not operate as an executed conveyance, as an executory contract, and will give it effect in one capacity, if it fail in the other." 2 Equity Lead. Cas. part 2, top page 224.

Therefore, the general subject of the argument becomes narrowed still more, and now touches the inquiry, whether the deed to Armstrong, viewed, not as a conveyance, but simply as a contract to convey, is such a contract as equity will specifically enforce, as against the heirs of Francis Besion or their grantees; and under the subsequent divisions I shall prove that such is not the case.

THIRD. No trust attached to the land in controversy, which can be enforced against the heirs of Francis Besion.

I. No trust attached to any land by the deed to Armstrong, for the cause so often repeated, to wit, because no definite land was described to which any trust could attach. But unless a trust be attached to, and run with, the land, there can be no decree as against an heir. 2 Story's Eq. Jur. sec. 790.

II. No trust descended with this land upon the heirs of Francis Besion, because they did not take this land by descent.

1. To bind the heir, in relation to any property, he must, *quoad hoc*, be in privity with his ancestor. 2 Story's Eq. Jur. sec. 788: 2 Black. Com. p. 201, note 2.

2. The heirs of Besion could not take by descent, because he was deceased long before the patent issued; and the heir, to take by de-

scent, must necessarily do so at the instant of the ancestor's death, or not at all.

3. If the legal title to this land ever became vested in the heirs of Francis Besion, it must have been by virtue of the act of Congress and of the patent issued to him and them. But in such case, the heirs would take as purchasers, and not by descent. And such was the explicit ruling, under precisely analogous circumstances, and after great consideration, in Goodell *v.* Jackson, 20 Johns. p. 706.

Hence, as the children of Francis Besion took this land as purchasers, it came to them free from all covenants and contracts of their ancestor.

COROLLARY. But if no trust, as to this land, could be enforced against the heirs of Besion, it is an irresistible inference, that no trust can be enforced against the grantees of such heirs.

FOURTH. There is no proof in the record that Francis Besion ever transferred his interest to Armstrong, or indeed to any one else. The deed produced was from Francis Bezayon. Printed Record, p. 52.

Besides, the acknowledgment was by Francis Bezayon, and was taken before a justice of the peace in the State of Indiana; but there is no certificate as to the character of the magistrate, such as is required by the laws of Illinois. Purple's Real Estate Statutes, p. 486; Act of Jan. 31, 1827.

FIFTH. The appellees have not brought themselves, by proper proofs, within the established rules indispensable to a decree.

I. Francis Besion had a mere promise of a gratuitous bounty from the Political Power; and the supposed assignment by him was void as being in contravention of public policy. He was a person to be peculiarly favored by courts of equity, as being, in a remarkable degree, *inops consillii*, and unfit to contract without, at least, the supervision of disinterested advisers. Jackson *v.* Wood, 7 Johns. p. 291; Goodell *v.* Jackson, 20 Johns. p. 692—708.

II. The deed to Armstrong bears, on its face, the strongest traces of fraud and unfairness.

1. It was made only eleven days after the approval of the treaty. The ink was scarcely dry on the paper which guaranteed to this unlettered child of the forest a future bounty from the Government, before the cunning speculator has managed to fasten upon the expectancy as his prey.

2. The deed recites that the grantor "desired to sell his interest for his own support and maintainance." And such an unusual clause indicates fraud. *Clausulæ inconsuetæ semper inducunt suspicionem.* Twyne's Case, 3 Coke, p. 80. The words reveal the stings of conscience, or the sense of shame, in the bosom of the grantee, and he attempts to put in the grantor's mouth some words of impotent justification.

3. The signature of the grantor is a mark, the old cross of the unlearned ages, and never, perhaps, was that symbol of celestial purity and divine hopes prostituted to a use at once so base and so contemptible. The inference is obvious, that the grantor could not write even his own name; and the natural presumption is violent, that he could not read.

Therefore, a court of equity will exact rigid proofs that the deed was read and explained to him. Selden *v.* Myers, 20 How. p. 506.

But we search in vain throughout this record for any evidence, even the faintest or most remote, on that subject.

III. The bill of the appellees does not allege that the consideration, expressed in the deed to Armstrong, was ever paid, nor is there in the testimony one particle of proof to that effect; although the answer denies such payment. Record, p. 16.

But courts of equity never decree specific performance, unless upon a contract certain and fair in all its parts, and for an adequate consideration. 2 Story's Eq. Jur. sec. 751.

IV. The bill does not allege payment of the promissory note

mentioned in the deed to Armstrong, and which was to secure one-fifth of the purchase money; nor is there any offer to pay it.

V. The bill, although it does not allege the payment of the consideration stated in the deed to Armstrong, avers its adequacy; but this stands denied by the sworn answer,—Record, p. 16,—and remains wholly destitute of proof.

VI. At the time of the supposed sale by Besion, it was impossible to determine, even approximately, the value of his future interest. Because the President might select a half section worth only five hundred dollars, or one worth five thousand, or even fifty thousand dollars. Therefore, as to the value, at least, the interest of Besion was a pure contingent expectancy. But in cases of this kind, where parties deal with expectants of future and contingent interests, courts of equity demand the greatest rigor of proofs, both as to the adequacy of the consideration, and the scrupulous fairness of the entire transaction. 1 Equity Lead. Cas. p. 411; Gowland *v.* DeFaria, 17 Ves. p. 70; Bantree *v.* Watson, 3 My. & K. p. 339; Davis *v.* Cooper, 5 My. & Cr. p. 270; Gwynne *v.* Heaton, 1 Bro. C. C. p. 9.

And, now, on the strength of the foregoing facts and principles, I beg leave to put the question the answer to which must present all the force and certainty of an *experimentum crusis*, for the solution of the problem at present before the court:—If Armstrong, the first assignee, and Francis Besion were both living, and this same bill were brought by the former against the latter, and the same sworn answer were put in, and the same proofs, and no more, were produced, could any tribunal of equity be found, in England or America, to decree a conveyance of the legal title from Besion to Armstrong? Would not the judge say, "show me, first of all, that the deed was read and explained to the illiterate child of the wilderness"? And then he would add, with a glow of just indignation, "show me, too, that this half-savage man, whose signature is the sign of the cross, had the aid of disinterested counsel from the beginning to the end of the negotiation which resulted in the deed before me. Make it clear as the sunlight, that the consideration was paid to the very last farthing. Disclose the proofs that demonstrate an equation betwixt price and value. Reveal the secrets of the soul,

693

and let me see the truth, as in a mirror,—the knowledge of the Indian as to what was the nature and worth of his expectancy, and his will, as to what he intended to convey. Else, avaunt, both you, and your unconscionable case, equally tainted with suspicion of unfairness, and reeking with the vile odors of fraud."

—Procul, o procul este, profani,
Conclamat vates, totoque absistite foro.

But if such would be the decree, in case the original parties to the deed were the parties litigant on the record, can the adjudication be different between their assignees? Can time or transmission uncloud a title, or purge away a fraud? *Assignatus utitur jure auctoris.* An assignee sits in the seat of his principal. Broom's Max. p. 350.

Therefore, whatever proofs would be requisite to sustain a bill against Francis Besion, if living, or when dead against his heirs, are equally necessary against the grantees of those heirs. The appellants stand before the bar of chancery, clothed with all the equitable rights and immunities which belonged to Francis Besion; while the appellees are clothed with every mark of fraud and unfair dealing which characterized the conduct of Armstrong. It is true the court can no longer, in a direct manner, punish the latter, or protect the former. The poor Indian has passed away forever. His fate has been like that of the great mass of his ill-starred race, who

"Have melted from the earth like snow
When streams are swol'n and south winds blow,
Dissolves in silent dew."

But Equity has still the power to exact an indirect justice in favor of the injured dead by maintaining the rights transmitted from his heirs. And Equity has also, and eternally, the higher prerogative to bid avaunt the semblance of a title originating in moral as well as legal wrong, and to brand the acts of fraud with infamy long after the perpetrator is mere dust and ashes.

SIXTH. The appellants are protected against any equity, if such indeed ever existed, by their character as *bona fide* purchasers.

I. The bill avers notice to the appellants of the equitable title in

the appellees. Record, p. 10. The answer denies notice. Record, p. 15, 16. And the allegation of notice is not sustained by any evidence. The bill also avers that the appellants purchased for only a nominal sum. Record, p. 10. But the answer denies this and shows a valuable consideration. p. 15, 16.

Hence, these denials in the answer can only be overcome by the usual preponderance of adverse proofs. 2 Eq. Lead. Cas. part 1, p. 119; Carpenter *v.* Washington Ins. Co., 4 How. p. 217; Flagg *v.* Mann, 2 Sumner, p. 486.

II. Since the appellees are seeking to divest a superior and legal title, the *onus* lies upon them to prove both notice and want of consideration. 2 Eq. Lead. Cas. part 1, p. 121; Sullivan *v.* Bates, 1 Littell, p. 42; Mason *v.* Peck, 7 J. J. Mar. p. 301; Roberts *v.* Salisbury, 3 Gill & Johns. p. 425.

III. The recording of the deed to Armstrong, and of the several assignments attached to it, could not operate as notice to the appellants.

1. Because no land, capable of identification, was described in either the deed or assignments. Munroe *v.* McCormick, 6 Ire. Eq. p. 85. The description in the deed to Armstrong only indicated "*some* land which the United States had agreed to grant to Francis Besion," but without the faintest reference to locality. Hence, it would have been a physical impossibility for a purchaser, by an inspection of the record, to find any clew which might guide him to this half section on the Kankakee river.

2d. The recording alleged was prior to the emanation of the patent; and purchasers were not bound to search the record upwards beyond the date of the latter. Farmers' Loan and Trust Co. *v.* Matby, 8 Paige, p. 361; State of Connecticut *v.* Bradish, 14 Mass. p. 302; Moore *v.* Hunter, 1 Gilman, p. 331; 2 Eq. Lead. Cas. part 1, p. 162.

Moreover, if a purchaser, taking the surveyor's numbers of this half section, had searched the record upwards to the first page, he would have discovered no deed by which it had ever been conveyed;

because there was no deed on the record describing it even by implication.

IV. The answer denies any possession on the part of the appellees, on the south side of the Kankakee river. Record, p. 19; and this denial is supported by the deposition of Chatfield, a witness of the appellees. Record, p. 43—45.

Therefore, the court below erred in rendering a decree in favor of the appellees.

SEVENTH. The court erred in rendering a decree in favor of Dutcher, Powell and Thatcher. Because, the bill had been previously dismissed as to them. Record, p. 32. They were no longer parties to the record, and, of course, not entitled to a decree.

EIGHTH. The court erred in rendering a decree in favor of Baum, Rowley, and Robersham. Because the deposition of Chatfield shows them to have been deceased before the hearing. Record, p. 45. And it needs no argument to prove that a decree in behalf of a dead man is erroneous.

NINTH. The court erred, because there is no equity on the face of the bill.

TENTH. The court erred, because the material averments of the bill are not sustained by proper proofs.

Finally, from all that has been said, it appears to me that I am entitled to ask confidently that this decree may be reversed. I think that the living voice of the law, which is also the voice of true reason, imperatively commands a reversal. But it may be, perhaps, alleged, on the other side, that the calls of public policy are loud and eloquent in favor of affirmance; and that a thousand individual interests, connected with the question, thunder appeals to expediency to let the decision stand. It may indeed be so. But I, for one, beg leave to make my solemn protest against the entrance of any such considerations into this presence. They have no business here, where the stern spirit of the law is supposed to dwell incarnate. Their

home is in a far different latitude of thought and action. I neither know nor can imagine of any public policy at all comparable to that which requires the great principles of our jurisprudence to be as fixed as the planets in their places; and more especially at a time like this, when the firmest pillars of society are seen to tremble as if reeling on an earthquake, and the very winds whisper of wildest change. Nor am I aware of any mere private interests, however mighty in either number or importance, fit even to be named in the same formula of speech with that absolutely universal interest of each and all, to feel assured to a certainty as clear and continuous as the witness of consciousness itself, that all their rights, whether of life, liberty, or property, are dependent alone upon the pure and passionless logic of the law, and not, in the faintest degree, upon the fickle moods of sentiment, or mutations of temper in "the fiend," discretion. May the specious and delusive doctrine of expediency never find one token of recognition here. Though the blessed lights of the constitution and laws should grow dim elsewhere all over the continent once radiant as the summer heavens with the effulgence of their beams, may they never pale one ray in this highest and holiest of all the temples consecrated to their worship. Like the beacon on the rock amidst the billows of a storm-swept ocean, let the old lights remain immovable here, though all around is change, and imperiled patriots, guided by this last and only signal of hope and safety, may still chance to weather the tempest, and after the horrors of a night of deepest gloom, may yet behold the ship of State return to her wonted moorings with the dawn of a better morrow. But if the watch-fires of a regulated liberty—which means merely a liberty standing on the eternal granite of an unalterable law—should ever be extinguished on this lofty shrine, so near the starry splendors, all will then be lost in the chaos of an enduring darkness, from which no benignant spirit shall ever again be able to evoke the beautiful elements of political order in combination with social progress, which together constitute the sole true glory and felicity of human kind. *His legibus solutis respublica stare non potest.*

IN THE

Supreme Court of the U. S.

No. 88.—December Term, 1861.

JONATHAN CREWS, ET. AL. APPELLANTS,

vs.

HENRY L. BURCHAM, ET. AL. APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief of Appellees.

This is an appeal from a decree in equity of the Circuit Court, restraining the appellants from prosecuting an action at law, which they had then commenced, and other suits which they threatened to prosecute against the appellees for parts or the whole of the E. fr. ½ of sec. 24, in T. 31, N. R. 13, E. of the 3rd principal meridian, now in Kankakee county, in the State of Illinois.

The case was submitted to the Circuit Court, on the bill, answer and exhibits, and the deposition of one William A. Chatfield.

The following facts appear in the case, and are undisputed:

By the third article of the Treaty concluded on the Tippecanoe River, on the 27th day of October, 1832, the United States agreed to grant, or, as it is expressed in one clause of the Treaty, reserved to Francis Besion, one-half section of land, to be located under the

direction of the President of the United States, and patented to the reservee.—(U. S. Statutes at Large, vol. 7, p.399.)

This reservation was subsequently located on the land in controversy, and a patent was issued for it, in the name of the reservee, on the 17th day of February, 1845. (Record, p. 50.)

On the 4th day of February, 1833, Francis Besion, the reservee, executed to one William Armstrong, a deed of conveyance for this half section of land, with full covenants of warranty, and for further assurance. (See pp. 50, 51, and 52, of the Record.) In this deed, the name of the grantor is written Francis Bezayon, but the name is probably *idem sonans*, with Besion, and he is described in the recitals in the deed, as the person to whom the reservation was made.

On the 2nd day of September, 1836, Armstrong and his wife assigned to one Thomas T. Benbridge, all their rights derived under the deed of Besion, and on the 13th day of August, 1842, Benbridge and his wife, executed a similar assignment to James Mix. These assignments were under seal, and contained words of conveyance and all the substantial requisites of deeds of bargain and sale. (Pages 53 and 54, of the Record.)

These instruments were duly recorded in the Recorder's offices of Will and Iroquois counties, in which the lands were situated long before the purchase by the appellants.—(See p. 54, of the Record.)

The land was then embraced within the limits of these counties as is fully shown by the acts of the legislature, organizing them.—(See Session Laws of Illinois, 1833, p. 19, and Session Laws of 1836, p 262.)

Mix and others claiming under him, including several of the appellees, took actual possession of the land in 1845 or 1846, and have remained in possession, and paid the taxes on it ever since; and in 1849 the north part of the land was laid out into a town by Mix, and lots were sold to various persons, many of whom are named. (See the deposition of Chatfield, p. 39 of Record.) But a part of the half section lay south of the Kankakee River, on which there were no improvements, though in 1853, it was laid out into blocks, as an addition to the town of Momence.—(See the same deposition, p. 45.)

They were in actual possession of the north part of the half section under the deeds, claiming title to, and paying taxes on the whole.

It is alleged by the complainants, that Besion died in 1843, and by the defendants, that he died in 1842.—(See pp. 9 and 15, of the Record.) Either of these dates was before the issuing of the patent.

In 1853, and after Mix and those claiming under him, had held possession of the land for some seven or eight years, in such a manner as necessarily to make their possession notorious throughout

the community, Crews and Sherman, two of the appellants, procured a deed of conveyance for the land, from one Asnick, as the sister and sole heir of the reservee. The other appellees claim under them, as to undivided interests. (Record, p. 21.)

The land having been sub-divided into town lots, by Mix, and many of the lots bargained to other parties, and very many persons interested as against their claim, the appellants, in October 1855, commenced an action of ejectment in the Circuit Court of the United States against Lydia Todd, a grantee under Mix, and threatened to commence other suits, (see statement of the bill, not denied by the answers, page 10.) Numerous leases, deeds, and bonds for deeds of lots had been given by Mix and others claiming under him, and Crews and others claiming under *him*, were interfering with their possession, and fencing up the streets and alleys in the town. (See answer of Chatfield to 10th, 15th, and 23d cross interrogatories, pp. 43, 44 and 47 of Record.)

Under these circumstances, the appellees filed their bill against the appellants to restrain them from prosecuting the action of ejectment which had been commenced, and from bringing other actions, or unlawfully interfering with their rights. The bill was sustained and a perpetual injunction granted in accordance with its prayer.

The appellants seek to reverse the decree, as we understand, on one of three grounds:

1st. That the deed from Besion to Armstrong and the subsequent assignments, vest no rights whatever in the appellees, and are absolutely void.

2nd. That if they are valid and operative, they vest a legal title, and our remedy at law is complete.

And 3d. That the appellants are *bona fide* purchasers without notice.

A great variety of technical points are suggested, as showing the invalidity of the deed from Besion to Armstrong. For example, it is urged that, prior to the issuing of the patent for the land, Besion had no interest under the treaty, which could be the subject of bargain and sale.

The provisions of the treaty amounted to a solemn grant by the Government to Besion, and his heirs and assigns of a half section of land, to be selected and patented to him by the President. An act of Congress agreeing to grant a certain number of acres of the puplic lands to a citizen, as a reward for eminent public services, and providing that the land should be selected and patented to him, under the directions of the President of the United States, would not vest a higher or more pefect interest than was vested in Besion by this treaty.

It surely needs no argument to show that such an interest would be something real and assignable. Such grants have been recognized as assignable in numerous cases.

French *v.* Spencer, 1st How. 228.
Landes *v.* Brant, 10th How. 348.
Stoddard *v.* Chambers, 2nd Peter's 316.

The act of Congress of May 20, 1836, (U. S. Statutes at large vol. 5, p. 31,) was intended to make the right and power of alienation in all such cases, absolutely perfect, and it effectually obviates all difficulties which might otherwise have existed in this case, on account of Besion having died before the issuing of the patent. That act provides:

"That in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died or shall hereafter die, before the date of such patent, the title to the land therein shall inure to and become vested in the heirs, devisees, or *assignees* of such deceased patentee, as if the patent had issued to the deceased person during life."

This act has received a construction favorable to the view which we have taken.

Galloway *v.* Finley, 12th Peter's, 264.
Landes *v.* Brant, 10th How, 372.

It therefore seems unnecessary further to notice arguments based on the old doctrine relative to the non-assignability of a mere expectency, as of an heir to the estate of a person not yet deceased. That doctrine was intended to prevent frauds upon the ancestor, and was founded upon principles of public policy, which can have no application to a case like the present.

In the absence of other and plainer authority in our favor, to which allusion will be made hereafter, we might safely rely on the doctrines of relation and estoppel. Besion executed a deed to Armstrong with a full covenant of warranty, for the half section of land secured to him by the treaty. The conveyance is *for the land*, not, as is argued, for his interest merely, and the covenant of warranty is as to the land. The patent when issued related back to the treaty. The land was so described in the deed as to show conclusively, and to the dullest apprehension, that it was the same land specified in the treaty, and afterwards described in the patent. By means of the covenant, the deed, like the patent, runs back to the inception of the title, and in order to prevent the necessity for an action on the covenant to recover back the purchase money, the deed would attach to and cover the title in all its parts. It is said by Justice CATRON, in French *v.* Spencer, 21st How, 240, that "the rule has always been, that where there was a warranty or covenant for title, that would cause circuity of action, if the vendee were evicted by the vendor, then the deed worked by estoppel."

But we need not, on this branch of the case, go behind the case of Doe ex dem. Mann and Hannah *v.* Wilson, 23d, How, 457. That case is remarkably in point, and is very recent. The Court

were unanimous in the decision, and at the hearing, nearly the same arguments were urged upon the Court, as are now presented by the appellants.

By reference to the record in that case, it will be seen that the two cases are precisely parrallel in these particulars.

Land was reserved in that case, to Petcheco, and in this to Besion, by the same article of the same Treaty of October 27, 1832.

In that case, Petcheco, before the issuing of the patent or location of the land, executed a deed of bargain and sale to Coquillard and Colerick, with covenants of warranty, describing the land by reference to the Treaty.

Colerick by indorsement on the back of the deed, with wrods of conveyance, almost identical in form with the assignments from Armstrong to Benbridge, and from Benbridge to Mix, in this case, assigned his interest to Coquillard, and Coquillard by a similar writing, assigned to Wilson.

And, as a remarkable coincidence, Petcheco like Besion, died before the issuing of his patent.

After hearing the same arguments now urged, the Court held that "it is manifest that sales of the reserved sections were contemplated"—"that Petcheco could sell his interest" and "that his grantees took the interest he would have taken if living."

The Court also held that the reservee was a tenant in common with the government, and much ingenuity is now exhausted in an effort to show, that in the particular relations existing between the government and a citizen, some of the less important peculiarities of a tenancy in common are wanting. But the substantial characteristics of a tenancy in common, undoubtedly existed in that case, and the law, by reason of its adaptibility to the growing and changing wants of society, applies well known principles to new conditions of things.

It is insisted, however, that the land in this case, did not lie within the district of lands ceded by the Treaty, and that therefore, the decision above referred to, does not apply in this case. If the President selected lands lying without certain limits, perhaps the reservee or his assignees might have had grounds for remonstrance. But the land is selected, and the patent is issued, as conveying the land mentioned in the Treaty. It is accepted and relied upon alike by all parties, as being the patent provided for by the Treaty. Hence, all parties are estopped by its recitals from denying that the land in controversy is the land which was intended by the Treaty to be set apart for Besion. A contrary rule would be equally fatal to the claim of the appellants, as of the appellees. This is like the case of both parties in an action of ejectment, tracing their title to a common source, the validity of which neither is permitted to dispute. Hence, the Court hold in the case last cited, that the recital in the patent was conclusive evidence that the land patented was the same as that reserved.

But the appellants contend that they are entitled to protection as *bona fide* purchasers without notice, even admitting our claim to be otherwise valid.

This we deny on two several grounds:

1st. The deeds under which the appellees claim, were duly recorded, and the appellants were bound to take notice of them. It is true that the deed from Besion to Armstrong, though properly acknowledged before a Justice of the Peace in Indiana, was not certified to by the Clerk of a Court of Record, as is required in most of the States, to admit such an instrument to record.

The Statute of Illinois, enacted January 18, 1833, and incorporated in the revised Statutes of 1845, declares that

"Deeds, mortgages, and other instruments of writing relating to real estate, shall be deemed, from the time of being recorded, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law, but the same shall not be read as evidence unless their execution be proved in the manner required by the rules of evidence applicable to such writings so as to supply the defects of such acknowledgment or proof."

R. S. Ill., 1845, p. 108, § 23.

This is conclusive in our favor on the point of notice.

It may be remarked that the instruments were all read in evidence without objection, and by consent of counsel.

2d. The possession of the land by Mix and those claiming under him, is equally conclusive in our favor on the question of notice. They had laid out a town and sold many lots, and had substantial improvements on the north half of the tract; and while so actually occupying the north half, they had for many years uniformly paid the taxes on the whole. No honest and ordinarily prudent purchaser could examine a tract of land so situated, without finding reason to suspect that some one claimed it; and it is evident that he could not have made enquiries of any inhabitant of the town without gaining abundant information on the subject.

It is, however, contended that the conclusive presumption of notice, from the fact of occupancy, does not apply to the south part of the land; but we answer by a quotation from Smith's Leading cases, vol. 2, p. 416, that, "where one enters under color of title, by deed or other written document, and occupies and improves the land, he acquires, in law, actual possession to the extent of the bounderies contained in the writing."

This ruling is fully sustained by the following cases:

Elliott *v.* Pearl, 10 Peter's, 443.
Barr *v.* Gratz, 4 Wheaton, 213.
Bell *v.* Longworth, 6th Ind. R., 273.
Thomas *v.* Harrow, 4 Bibb. R., 563.

In Elliott *v.* Pearl, Pearl had entered into possession of a large tract of land under a deed from one Edwards—his house and set-

tlement were on one side of a thousand acre tract. Judge Story in delivering the opinion of the Court, says: "As the deed described the tract by metes and bounds, Pearl must be deemed to have been in possesion of the whole tract; unless some part of it was, which is not shown, in the adverse possession of some other claimant. In short, his entry being under color of title by deed, his possession is deemed to extend to the bounds of that deed, although his actual settlement and improvement were on a small parcel only of the tract. In such cases, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party; upon the ground that it is his clear intention to assert such possession. This doctrine is well settled."

Again it seems to be argued that as the land conveyed by Besion to Armstrong, was not defined by metes and bounds, the subsequent purchasers were not bound to presume that the land which they bargained for was the same referred to in the Armstrong deed. But both the Armstrong deed and that under which the appellants claim, recite that the land intended to be conveyed is that which was reserved to Francis Besion by the treaty of 1832. It was therefore impossible for the appellants, after examining the deed to Armstrong as they were bound to do, not to know when they took their deed, that it was for the same land. That is certain, which can be rendered certain, and no description could be more susceptible of certainty, than the description of the land contained in Besion's deed to Armstrong.

It is somewhat incidentally claimed that the deed to Armstrong was fraudulent and therefore void, and the Court is referred to Goodell *v.* Jackson, 20 I. R., 692. That and the case of Lee *v.* Glover, 8th Cow., 189, were based wholly on a peculiar provision of the then constitution of New York, by which white persons were forbidden to purchase land from Indians, without the consent of the legislature. The mere fact that an instrument is signed by a mark is surely slender ground for calling on a Court to declare fraudulent an ancient deed, under which parties have long claimed title to land and held undisputed possession.

All parties of proper age are presumed to be competent to make their own contracts till the contrary appears. Francis Besion conveyed this land to Armstrong in February, 1833. The consideration is stated in the deed, and admitted to have been paid except $100, which was secured by a note, and as to which after twenty years, a presumption of payment exists. No ojbection to the transaction on the ground of fraud, inadequency of price, or for any other cause is made, till, when after more than twenty years, these appellants allege that as they are informed, and believe the price was inadequate, but no proof is offered to impeach the deed.

We submit that the imputation of fraud or inadequacy of price falls to the ground.

It only remains to consider the question as to the right of the